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USING STATUTES TO SET LEGISLATIVE RULES: ENTRENCHMENT, SEPARATION OF POWERS, AND THE RULES OF PROCEEDINGS CLAUSE

*Aaron-Andrew P. Bruhl**

INTRODUCTION

In August 2002, President Bush signed an omnibus trade bill that included, among many other items, the Bipartisan Trade Promotion Authority Act.¹ Trade promotion authority, also known as “fast track,” empowers the administration to negotiate trade agreements with foreign governments, then submit bills implementing the agreements to Congress for streamlined consideration. Under fast track rules, Congress is required to schedule a vote within two months, and neither chamber may amend the president’s implementing bill. Fast track thus guarantees the president (and trade partners) a speedy up-or-down decision on the nation’s participation in a free trade agreement. Regaining fast track authority, which last expired in 1994, had been one of President Bush’s top legislative priorities, just as it had been for President Clinton.²

Fast track establishes statutory rules of debate that supplant the internal procedures that otherwise govern each chamber’s consideration of proposed legislation. The legislature’s power over its internal rules is rooted in the Constitution, which provides that “[e]ach House may determine the Rules of its Proceedings.”³ Although this clause generates little excitement among constitutional scholars, and even the Framers gave it scant attention, it grants the House and Senate a vast power to flesh out the Constitution’s mere skeleton of a legislative process. The Constitution does not prescribe

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¹ Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (2002).

² See Elizabeth Bumiller, *Bush Signs Trade Bill, Restoring Broad Presidential Authority*, N.Y. TIMES, Aug. 7, 2002, at A5; William Claiborne, *Lauding Trade, Clinton Urges “Fast Track,”* WASH. POST, June 13, 1999, at A5.

³ U.S. CONST. art. I, § 5, cl. 2.

parliamentary procedures, create a committee system, or do any of the multitude of things necessary for a legislature to function. Instead, each chamber has typically established these procedures and internal structures through unilateral resolutions—that is, resolutions passed by one chamber without the involvement of the other house or the president. But sometimes, as in the case of the Bipartisan Trade Promotion Authority Act and certain other statutes, the legislature uses a statute to prescribe its internal procedures—employing what I will call a “statutized rule.”

While statutized rules are departures from the usual scheme of legislative self-governance, they are neither new nor especially rare. In 1789, the nation’s first legislators under the new Constitution enacted a statute regulating the order of business at the beginning of new sessions of Congress, a matter that plainly could be regulated unilaterally under each chamber’s rules power.⁴ Since that time, Congress has legislated in a number of areas—including committee membership and jurisdiction,⁵ punishment for absent members,⁶ and procedures for election contests⁷—that could, under specific constitutional authorizations, be handled through unilateral action by each house.⁸ By far the largest category of such legislation consists of statutes that, like trade promotion authority, govern the rules of debate for particular types of legislation. There are dozens of such statutes, some governing matters as weighty as the federal budget and others concerning relative curiosities like commercial space launch reinsurance.⁹ Such measures, which typically provide for expedited

⁴ See *infra* notes 81-82 and accompanying text.

⁵ See statutes cited *infra* notes 92 & 94.

⁶ See 2 U.S.C. § 39 (2000).

⁷ See 2 U.S.C. §§ 381-396 (2000).

⁸ In addition to the Rules of Proceedings power, which encompasses committee structure, the relevant textual authorization for handling these matters unilaterally is Art. I, § 5, cl. 1: “Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and [a number less than a quorum] may be authorized to compel the Attendance of absent Members in such Manner, and under such Penalties as each House may provide.” See also U.S. CONST. art. I, § 5, cl. 2 (providing, in addition to the rules power, that “[e]ach House” may “punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member”).

⁹ The fast track procedures for trade agreements are codified at 19 U.S.C. § 2191. Other examples of debate-regulating statutes (some of which are codified and others of which are present only in the session laws) include the following: 2 U.S.C. §§ 631-645a (2000) (congressional budget process); 2 U.S.C. §§ 658d-e (legislation containing unfunded mandates); 5 U.S.C. § 802 (procedures for legislation that nullifies agency regulations); 5 U.S.C. §§ 901-12 (executive reorganization plans); 8 U.S.C. § 1254a(h) (Senate rules for

consideration and limit or forbid amendments, appear to be gaining in popularity, perhaps as a response to the increasingly sclerotic nature of the usual “slow track” legislative process.¹⁰ Statutized rules’ increasing prevalence can thus be viewed as another manifestation of the rise of “unorthodox lawmaking” in Congress—that is, the use of practices that bypass the ordinary legislative path found in civics texts.¹¹

Not only do fast track rules offer a way to bypass many of the usual procedural hurdles, but, when conjoined with a delegation of authority to the executive branch, a fast track regime can act as a close substitute for the legislative veto.¹² The latter device, declared unconstitutional in *INS v. Chadha*,¹³ confers decisionmaking authority on the executive branch but lets Congress nullify the executive’s decision by subsequently passing a disapproval

legislation adjusting the status of certain aliens); 15 U.S.C. § 719f (procedures for approving presidential determinations concerning Alaskan natural gas pipelines); 16 U.S.C. § 1823 (procedures for disapproving international fisheries agreements); 29 U.S.C. § 1306(b) (procedures for considering Pension Benefit Guaranty Corporation premium revisions); 42 U.S.C. § 2210(i) (procedures for nuclear accident compensation legislation); 42 U.S.C. § 6249c (legislation implementing certain petroleum contracts); 50 U.S.C. § 1622 (procedures for terminating presidentially declared states of emergency); Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, § 205, 111 Stat. 2570, 2582 (Senate procedures for considering Amtrak restructuring and liquidation plans); Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 104-208, § 518A, 110 Stat. 3009 (1997) (procedures for approving presidential findings regarding population planning funding); Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, § 208, 102 Stat. 2623, 2632-33 (1988) (procedures for considering recommendations to close military bases); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7323, 102 Stat. 4181, 4467-68 (Senate procedures for habeas corpus reform legislation); see also *infra* note 79 (providing more examples); cf. CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES [H.R. DOC. NO. 106-320] § 1130 (Charles W. Johnson ed., 2001) [hereinafter HOUSE MANUAL] (setting forth the text and applicable parliamentary interpretations of thirty statutes that confer “privileged” procedural status on certain resolutions disapproving of executive actions).

¹⁰ See Charles Tiefer, *How to Steal a Trillion: The Uses of Laws About Lawmaking*, 17 J. L. & POL. 409, 410-12 (2001) (noting the increasing importance of laws structuring the legislative process).

¹¹ See BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (2d ed. 2000).

¹² The similarity between the two devices is suggested in Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 792-96 (1984); cf. H.R. REP. NO. 98-257, pt. 3, at 3 (1983) (suggesting that fast track schemes will become more popular in the wake of the *Chadha* decision); Tiefer, *supra* note 10, at 423 (noting that *Chadha* and the line item veto decisions increased the importance of the alternative strategy of passing laws that streamline the legislative process).

¹³ 462 U.S. 919 (1983).

resolution.¹⁴ Under a fast track scheme, Congress can let the president (or an administrative agency) make the initial policy decision, the implementation of which is conditioned on passage of an administration-drafted confirmatory statute via an expedited up-or-down vote. Under fast track the legislature must still affirmatively endorse the executive's chosen policy, but the special procedure guarantees that the measure comes up for a vote quickly, thus overcoming the procedural roadblocks that beset the ordinary legislative process. An effective fast track regime thus reduces the inertia that stands in the path of passing a law. In terms of congressional effort, approving the confirmation statute when it automatically comes up for a vote is not *that* much more burdensome than refraining from adopting a legislative veto resolution—or, at any rate, approving the fast track confirmation statute is certainly easier than passing normal legislation—and so fast track and the legislative veto approach a rough equivalence. Yet, constitutionally speaking, there is all the difference in the world, since a bill passed under fast track still complies with Article I, Section 7's requirement of bicameralism and presentment.¹⁵

Given fast track's evident advantages, it is unsurprising that commentators have advocated extending fast track to a number of important policy areas that, like trade policy, require close legislative-executive coordination.¹⁶ Congressional interest continues as well. Demonstrating one of the most far-reaching potential uses for fast track, the 104th Congress considered (but rejected) proposals that would require all significant administrative regulations

¹⁴ Under different versions of the legislative veto, the disapproval resolution would need to be passed by both houses, one house, or merely by a committee. The broadly worded decision in *Chadha*, together with the Supreme Court's summary dispositions of other cases, see *Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983); *United States Senate v. FTC*, 463 U.S. 1216 (1983), make it clear that all forms are impermissible.

¹⁵ Leading authorities therefore agree that statutes passed pursuant to such a regime do not run afoul of *Chadha*. See, e.g., Breyer, *supra* note 12, at 792-96; Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 18-20 (1984).

¹⁶ See, e.g., Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687, 716-35 (1997) (arguing for extending fast track to arms control and environmental agreements, but not war powers or foreign assistance); Ronald A. Lehmann, Note, *Reinterpreting Advice and Consent: A Congressional Fast Track for Arms Control Treaties*, 98 YALE L.J. 885, 896-903 (1989); Vanessa Patton Sciarra, Note, *Congress and Arms Sales: Tapping the Potential of the Fast-Track Guarantee Procedure*, 97 YALE L.J. 1439, 1453-57 (1988). *But cf.* Breyer, *supra* note 12, at 796-98 (expressing skepticism over the wisdom of implementing such a regime with respect to agency rulemaking).

to receive approval by Congress, under fast track rules, in order to take effect.¹⁷

The increasing popularity of statutized rules underlines the importance of understanding the legal and practical issues they raise. Using statutes to set the rules of debate is in some ways quite problematic from the perspective of the constitutional lawyer. In particular, there is good reason to doubt whether a regime of statutized rules can legally bind a later legislature that wishes to use different procedures. In fact, Congress itself appears to hold the view that each house always possesses a constitutionally mandated power to change its own rules, regardless of what any statute says about the matter.¹⁸ If Congress were correct, that constitutional reality would render fast track schemes devoid of legal effect. It would then be something of a puzzle why the president places such importance on fast track, and why Congress has bothered to pass so many statutes regulating its internal affairs, when a subsequent vote in either chamber could abrogate those statutory arrangements. The statutes could have only political, but not legal, meaning.

Why is a legally effective regime of statutory procedures considered constitutionally suspect? The consensus view, shared by Congress and commentators, is that statutized rules are troubling because they implicate a constitutionally rooted anti-entrenchment norm that forbids one legislature from binding its successors—in this case, binding successors to follow particular rules of debate. The problem with a statute that attempts to govern a subsequent legislature's procedures, on this view, is the same problem that would beset a statute that purported to permanently establish spending limits. Both interfere with the prerogatives of a later (but otherwise equally dignified) legislature, and so they cannot bind.

In my view, the conventional critique is mistaken. There is a problem with statutized rules, but it is not that they are entrenching. Rather, as this Article explains, the true difficulty lies in separation of powers considerations. When the legislature statutizes the rules of debate, it gives the president a say in a sphere of activity where, constitutionally speaking, he should have no voice. Giving the president a role in setting legislative rules would seriously alter the

¹⁷ See Significant Regulation Oversight Act of 1996, H.R. 2990, 104th Cong. (1996); Congressional Responsibility Act of 1995, H.R. 2727, 104th Cong. (1995).

¹⁸ See *infra* Part I.B.

distribution of policymaking power between the branches and violate the constitutionally mandated sovereignty of the legislature over its own internal affairs.

I readily admit that the problem of statutized rules does not look like what has come to represent the typical separation of powers case. The dominant modern trend in separation of powers analysis has been to focus on the Constitution's three Vesting Clauses, which endow each branch of government with its own characteristic type of power: legislative, executive, and judicial. The task is then to determine whether one branch is guilty of performing the "wrong" function—such as would occur if the president tried to legislate or Congress sought to execute.¹⁹ But the functional truisms of the Vesting Clauses seem to offer little help here, for Congress is still legislating when it acts under statutized rules, the president is still executing, and so on. It is wrong, however, to think that the absence of a functional mismatch is the end of the separation of powers inquiry. As other scholars have shown, the separation of powers also resides in clauses that constitutional lawyers tend to overlook. The Incompatibility Clause and the Appointments Clause, for example, possess a structural significance that belies their prosaic appearances.²⁰ So too with the key text here, the Rules of Proceedings Clause, or at least so I will contend. The Rules of Proceedings Clause gives practical content to Article I, Section 7, and as such it plays a crucial role in constituting the inter-branch balance of policymaking authority.

The analysis proceeds in three Parts. Part I describes the practical problem that fast track is intended to confront and explains how fast track tries to solve it. As we will see, fast track responds to features of the legislative process that are common to all types of legislation but that can have particularly severe consequences in areas like trade. As Part I also explains, however, fast track's attempts to structure the legislative process raise questions about whether the Constitution

¹⁹ Cf. Victoria F. Nourse, *Political Relationships and the Separation of Powers*, 56 STAN. L. REV. (forthcoming Dec. 2003) (decriing the rise of a separation of powers jurisprudence focused on functional mismatches and the Vesting Clauses).

²⁰ See, e.g., Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994) (elaborating separation of powers implications of the Incompatibility Clause); Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 472-77, 511-21 (1996) (explaining the centrality of appointment, tenure, and salary).

would countenance a binding statutized rule. Expressing its own worries on the matter, Congress typically (though not unfailingly) includes disclaimers in statutized rules that recognize that either chamber may unilaterally abrogate the statutory procedures.

Part II explores and questions the conventional wisdom about the constitutional status of statutized rules like fast track. Congress and commentators agree that it would be impermissible to bind future Congresses to follow rules laid down in an earlier statute. Such a result, they contend, would violate a well-established norm of anti-entrenchment. I argue that fast track does not have an entrenching effect or, if it does, that the type of entrenchment it represents is not as troubling as is ordinarily supposed. To understand the constitutional problem (if any) with statutized rules, we must look elsewhere.

Part III, the longest portion of the Article, provides an alternative theoretical framework for understanding the constitutionally troubling aspects of statutized rules. The claim is that the Rules of Proceedings Clause plays an important (if underappreciated) role in creating a government of separate, independent powers. Allowing procedures to be set by statute would effect a radical shift in policymaking power from the legislature to the president, and, moreover, it would do so in a way particularly offensive to the Framers' design. The problem with statutized rules, therefore, is not that they represent a cross-temporal power-grab between one legislature and a subsequent one—which would implicate the anti-entrenchment norm—but that they represent an unconstitutional horizontal shift of power between departments of government. In some cases, the separation of powers approach to statutized rules generates different answers on the constitutional merits than does the entrenchment-based understanding. On the whole, however, the separation of powers analysis laid out in Part III largely agrees with the consensus position that statutized rules are constitutionally suspect; it does, however, seek to provide a more satisfying theoretical account of why exactly they are troubling.

I. HOW STATUTIZED RULES (DON'T?) WORK

Fast track can be an extremely useful procedural innovation. That something is convenient and efficient does not mean that it is constitutionally permissible, of course, for "the Framers ranked other values higher than efficiency."²¹ Indeed, we will see later on that a legally binding fast track statute might be unconstitutional. The cost of making fast track constitutional might be to remove the very feature that would let it accomplish its goals: its power to control later legislatures. To get a hold on these constitutional questions, which are explored in Parts II and III of this Article, it is necessary to see what a fast track statute is supposed to accomplish. Although fast track statutes exist in a number of policy areas,²² the fast track system for trade agreements is likely the most prominent, and so in this Part of the Article I shall use it as an example of how such regimes operate. The constitutional issues that these regimes raise are generally the same across various policy contexts.

The current fast track system for free trade agreements is the latest of several efforts to strike a workable balance between legislative and executive control over foreign trade.²³ As a matter of constitutional law, Congress holds the power to "regulate Commerce with foreign Nations,"²⁴ but the modern president's place as the nation's chief actor in foreign affairs means that the executive branch has long played a prominent role. For much of the twentieth century, Congress gave the president authority to negotiate reciprocal tariff reductions with foreign governments; the new rates were then established by presidential proclamation, without the need for further legislative authorization. At the same time, Congress had been unwilling to give the president so much authority with respect to non-tariff barriers (NTBs), reductions in which would have a greater effect on domestic law. Notwithstanding the reluctance of Congress, administration trade representatives negotiated a number of sensitive NTB issues during the Kennedy Round of trade

²¹ *INS v. Chadha*, 462 U.S. 919, 959 (1983).

²² See *supra* note 9 and accompanying text.

²³ For an overview of the various regimes that have been attempted over the last century, see Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191, 1192-1208 (1986). The brief summary provided in this paragraph of the text draws upon Koh's account.

²⁴ U.S. CONST. art I, § 8, cl. 3.

negotiations in the 1960s. Believing that the administration had overstepped the bounds, Congress then refused to enact some of the measures the administration had promised to trade partners. That failure, and the inter-branch conflict that produced it, were widely regarded as having damaged the credibility of American trade negotiators.²⁵

Chastened by the Kennedy Round experience, and chastened further by the executive abuses brought to light in the Watergate scandal, Congress fashioned a new regime in the Trade Act of 1974.²⁶ The 1974 Act is a massive statute, but the important aspect for present purposes is the way it handles major trade agreements on NTBs. Reduced to basics, the regime established in the 1974 Act (as amended by subsequent legislation) authorizes the president to negotiate free trade agreements that Congress can then approve using special “fast track” implementation procedures.²⁷ The trade pacts have no domestic legal effect unless Congress approves them by passing them as a statute. For example, the North American Free Trade Agreement (NAFTA) committed the United States to restore the copyrights of certain Canadian and Mexican films, but that commitment only became effective in U.S. law when the NAFTA Implementation Act amended the Copyright Act.²⁸ A bill implementing a trade agreement is passed as ordinary bicameral legislation; it is not treated as a formal “treaty” requiring ratification by two-thirds of the Senate.²⁹

²⁵ S. REP. NO. 107-139, at 2 (2002); Koh, *supra* note 23, at 1192-1200.

²⁶ Pub. L. No. 93-618, 88 Stat. 1978 (1975).

²⁷ The authorization is time-limited, so Congress must extend the president's authority from time to time. The extensions typically incorporate further fine-tunings of the respective roles of the two branches. For a summary of how the regime has developed over time, see Carrier, *supra* note 16, at 700-15.

²⁸ See Pub. L. No. 103-182, § 334, 107 Stat. 2057, 2115 (1994) (adding 17 U.S.C. § 104A).

²⁹ There has been significant scholarly debate over whether major trade agreements may be implemented as ordinary legislation rather than via the route specified by the Constitution's Treaty Clause, art. II, § 2, cl. 2, which requires the approval of two-thirds of the Senate. Compare Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995) (arguing that either route is permissible), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1249-78 (1995) (expressing skepticism about dispensing with the Treaty Clause). Whatever the constitutional merits, the two methods have in practice come to be viewed as interchangeable in most cases, with political considerations typically playing the predominant role in selecting one form rather than the other. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987). The courts have refused to enter the dispute. See *Made in the USA Found. v. United States*, 242 F.3d 1300 (11th Cir. 2001) (abstaining, on

As ordinary legislation, bills implementing trade pacts would be subject to all of the hurdles of the normal legislative process. As described in more detail below, the familiar process can prove especially dangerous to measures like trade agreements. Fast track regimes, whether in the trade domain or elsewhere, deviate from the ordinary legislative process by creating streamlined rules that smooth out the usual bumps. In explaining what fast track does, and why it is desirable, it is therefore useful to start by comparing it with the alternative: the “slow track” that characterizes the usual process.

A. *The Slow Track and the Fast Track*

It is no accident that our system makes it difficult to pass legislation. Indeed, among the Framers’ many goals was the aim of avoiding what they perceived as an epidemic of excessive lawmaking in the state legislatures.³⁰ Thus Article I, Section 7 of the Constitution requires that a bill receive the assent of a majority of the House of Representatives, a majority of the Senate, and the president (whose negative can be overridden only by supermajorities in both chambers) before it can become law.³¹ As the Supreme Court has forcefully reaffirmed on several occasions, the Constitution mandates that federal legislative power be exercised through the “single, finely wrought and exhaustively considered” path of bicameralism and presentment, no matter how inconvenient that mandate turns out to be.³²

While the requirements of Article I, Section 7 are daunting enough by themselves, the obstacles erected by the Framers pale in comparison to those thrown up by Congress’s traditions and internal rules. In one scholar’s estimation, a complex piece of legislation has to achieve as many as *fifty to sixty* different majorities at various points in the legislative process before finally finding its way to the president’s desk.³³ But unlike Article I, Section 7, these procedural

prudential grounds, from deciding whether NAFTA was subject to the requirements of the Treaty Clause), *cert. denied sub nom.* United Steelworkers of Am. v. United States, 534 U.S. 1039 (2001).

³⁰ See THE FEDERALIST NOS. 62, 63 (Alexander Hamilton or James Madison), NO. 73 (Alexander Hamilton).

³¹ U.S. CONST. art. I, § 7.

³² INS v. Chadha, 462 U.S. 919, 951 (1983); see also Clinton v. City of New York, 524 U.S. 417, 448 (1998) (invalidating the Line Item Veto Act for violating Art. I, Section 7).

³³ CHARLES O. JONES, AN INTRODUCTION TO THE STUDY OF PUBLIC POLICY 94-95 (2d ed. 1977).

barriers are subject to congressional amelioration. It is worth noting a few salient procedural obstacles in the path of lawmaking, since it is these barriers at which fast track regimes take aim.³⁴

Near the top of any such list would be the committee system. Although committees are bypassed more frequently now than in the past,³⁵ it is still beyond dispute that most of the work of Congress occurs in committee. And while Congress could hardly function without the committee system, the system has the effect of adding an important set of decisionmakers who ordinarily must sign off on a bill for it to become law.³⁶ Even when the majority of a committee is favorably disposed toward a bill, the committee chairman, though a less powerful figure since the reforms of the 1970s, still has enough clout effectively to kill bills he or she dislikes by refusing to schedule them.³⁷ So too can the chairman doom a bill by referring it to a hostile subcommittee.³⁸ The vast bulk of bills introduced in Congress die in committee, often without even a vote.³⁹

For those lucky bills that do emerge from committee, there is still the legislative calendar to confront. Most bills would never be considered on the floor if they were considered in the order in which they were listed in the calendar. In the House, timely consideration of proposed legislation thus normally requires that its sponsors receive a special order (or rule) from the Rules Committee to

³⁴ The account I provide in the next few paragraphs is in no way meant to capture all of the many nuances and details of legislative procedure. Comprehensive treatments of the subject include WALTER J. OLESZEK, *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* (5th ed. 2001), and CHARLES TIEFER, *CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE* (1989). For a briefer but quite detailed description of the legislative process, see WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 24-38 (3d ed. 2001).

³⁵ See OLESZEK, *supra* note 34, at 103-06.

³⁶ There are procedures for discharging bills from a recalcitrant committee, but they are of limited effect. See, e.g., *id.* at 88 ("A committee's decision not to report a bill generally will be respected by the chamber as a whole. . . . [Procedures for overturning committee decisions] are employed infrequently and are seldom successful.")

³⁷ Although House and Senate rules permit committee majorities to force the scheduling of a bill, this is "rarely threatened and almost never attempted." ESKRIDGE ET AL., *supra* note 34, at 28.

³⁸ See ABNER J. MIKVA & PATTI B. SARRIS, *THE AMERICAN CONGRESS* 206 (1983) (discussing how different subcommittee assignments affected the fate of federal criminal legislation).

³⁹ For statistics on the number of bills introduced, reported from committee, voted upon, etc. for the 91st Congress through the current Congress, see Resumes of Congressional Activity, at <http://thomas.loc.gov/home/resume/resume.html> (last updated Jan. 6, 2003).

advance it on the calendar.⁴⁰ The House Rules Committee itself is therefore yet another crucial gatekeeping institution. In the Senate, scheduling is typically handled through unanimous consent agreements, which, as the name implies, require the assent of each senator.⁴¹

Upon finally reaching the floor, being voted down is hardly the only way a bill might die. In the Senate, in fact, a determined minority can prevent a bill from ever coming to a vote at all, for a motion to end debate on a bill requires sixty votes.⁴² Though nowhere dictated by the Constitution, the Senate thus essentially employs a supermajority voting rule.⁴³

There is reason to believe that the traditional procedural hurdles canvassed above have been growing higher in recent decades. In the House, the same reforms that weakened the committee chairmen have had the result of increasing rank-and-file members' incentives and resources to engage in lengthy amendment battles.⁴⁴ Senators seem to have become less reticent about exploiting their prerogatives to extend debate and offer extraneous amendments.⁴⁵ Filibusters have become more frequent.⁴⁶

⁴⁰ See OLESZEK, *supra* note 34, at 120-21. Certain measures, such as budget resolutions and appropriations bills, enjoy a privileged status that entitles them to expedited consideration. *Id.* at 117-18. Measures can also gain speedy consideration through suspension of the rules, but such a procedure requires a two-thirds majority. HOUSE R. XV; OLESZEK, *supra* note 34, at 112-14.

⁴¹ See OLESZEK, *supra* note 34, at 194-202. Though the leadership tries to honor the objections of individual senators to the extent possible, in the absence of unanimous consent the majority leader can make a motion to proceed to consideration of the bill, which formally requires only majority approval. But such motions are generally subject to filibuster. See TIEFER, *supra* note 34, at 565-66.

⁴² See SENATE R. XXII(2). On the filibuster generally, see SARAH A. BINDER & STEVEN A. SMITH, *POLITICS OR PRINCIPLE: FILIBUSTERING IN THE UNITED STATES SENATE* (1997); TIEFER, *supra* note 34, at 691-766; and, for emphasis on constitutional issues, Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997).

⁴³ See, e.g., OLESZEK, *supra* note 34, at 228 ("The Senate . . . is a supermajoritarian institution, because sixty votes (three-fifths of the membership) are commonly required to enact major and controversial legislation.").

⁴⁴ SINCLAIR, *supra* note 11, at 89-98, 108.

⁴⁵ See *id.* at 56 ("Senators have always had the right under the rules to talk as long as they wished, offer multitudes of amendments, and propose nongermane amendments. They have always used those prerogatives. Yet all the evidence we have indicates that the frequency of such behavior has increased enormously in recent decades.").

⁴⁶ BINDER & SMITH, *supra* note 42, at 6-13; SINCLAIR, *supra* note 11, at 85 tbl.6.1, 98-99. In recent sessions, at least half of major legislative proposals experienced filibuster-related problems. SINCLAIR, *supra* note 11, at 99 tbl.6.5. The filibuster has also changed qualitatively. Rare are the occasions on which a senator will actually hold the floor for hours on end. Most

The upshot of the foregoing considerations is that every bill must pass through an increasingly daunting series of choke points—or “vetogates,” as one group of scholars calls them⁴⁷—each of which holds out the threat of defeat or at least delay. Each vetogate is also an opportunity for the relevant decisionmaker to exact an amendment as the cost of passage. As a result, controversial bills that manage to survive to enactment frequently bear little resemblance to the measure originally proposed.

The vetogate-studded character of our legislative process affects all types of initiatives, not just trade agreements. Yet even so, the risk of delay, defeat, and amendment is particularly troublesome in a context like foreign trade. As even Congress freely admits, the ordinary legislative process has “several disadvantages” when it comes to implementing free trade pacts:

Under ordinary rules, a bill may be amended in a manner inconsistent with the underlying agreement, which may require the President to re-open negotiation of the agreement. Ordinary rules do not require that a bill be voted on by a date certain, or that it be voted on at all. A trade agreement could be concluded and languish indefinitely.

These aspects of ordinary legislative procedure pose difficulties for trade negotiations. A foreign country may be reluctant to conclude negotiations with the United States faced with uncertainty as to whether and when a trade agreement will come up for approval by Congress. Similarly, a country may be reluctant to make concessions, knowing that it may have to renegotiate following Congress’s initial consideration of the agreement.⁴⁸

One can easily imagine how these possibilities could materialize. A group of senators from the Midwest could threaten to filibuster an implementing bill unless the president’s negotiators extracted more

filibusters are now merely threats to filibuster, or “stealth filibusters,” which makes them easier to carry out. Fisk & Chemerinsky, *supra* note 42, at 200-209.

⁴⁷ McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (1994).

⁴⁸ S. REP. NO. 107-139, at 2 (2002).

concessions on agricultural subsidies. A crucial committee chairman in the House, who happens to hail from the Rust Belt, could demand protectionist quotas on steel imports.⁴⁹ The desired adjustments could upset a careful compromise that trade negotiators had labored over for months. If the agreement were rejected altogether, American trade negotiators would have squandered time and strategic capital. And even if the agreement sailed through Congress without incident, the mere possibility of congressional mischief or inaction would surely influence the positions of foreign negotiators.

The recently re-enacted fast track procedures for trade pacts, which originated in the Trade Act of 1974,⁵⁰ carefully regulate the consideration of implementing bills with an eye toward sweeping away the obstacles associated with the familiar legislative process. Under fast track, the majority leader of the House and the majority leader of the Senate, or their designees, are to introduce the president's implementing bill in their respective chambers on the same day that the president submits it to Congress.⁵¹ The presiding officer of each house should then refer the bill to the appropriate committee(s).⁵² The procedures then require the committee to act on an agreement within forty-five days,⁵³ ensuring that the administration's trade agreements avoid the silent death that befalls many bills in committee. Once the bill reaches the floor, a vote on final passage must be taken within fifteen days.⁵⁴ Fast track is indeed

⁴⁹ In considering the likelihood of such events occurring, it is worth noting that the Smoot-Hawley Tariff Act of 1930, widely viewed as contributing to the global Depression, was the legislature's last serious attempt to regulate foreign commerce on its own. "Because congressional logrolling and horsetrading contributed to every individual duty rate, Smoot-Hawley set the most protectionist tariff levels in U.S. History. . . . [Its] most lasting legacy has been a lingering public impression, fostered by the President, that near total congressional control of international trade is synonymous with protectionism." Koh, *supra* note 23, at 1194.

⁵⁰ Trade Act of 1974, Pub. L. No. 93-618, § 151, 88 Stat. 1978, 2001 (1975) (codified as amended at 19 U.S.C.A. § 2191 (West 1999 & Supp. 2003)). Subsequent reauthorizations of fast track have incorporated those procedures by reference to the 1974 Act. See, e.g., Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, § 2103(b)(3)(A), 116 Stat. 933, 1006 (providing that the procedures of section 151 of the 1974 Act apply to qualifying implementation bills).

⁵¹ 19 U.S.C.A. § 2191(c)(1) (West Supp. 2003). If either chamber is not in session, the bill will be introduced on the day they return. *Id.*

⁵² *Id.*

⁵³ 19 U.S.C. § 2191(e)(1) (2000).

⁵⁴ *Id.*

fast, at least compared to what can happen to controversial legislation without it.⁵⁵

Just as important as providing for expedited consideration, the procedures also bar any attempt to amend the implementing bill.⁵⁶ All types of legislation face the risk of debilitating amendment, of course, but even minor amendments are extremely risky in this context, since they could require trade representatives to renegotiate the entire deal, often effectively scuttling the agreement. Recognizing this possibility ahead of time, foreign governments would be loath to sign on in the first place. Fast track's flat prohibition on amendments is thus at the heart of its rationale.⁵⁷

In addition to prohibiting amendments and forcing speedy votes, fast track regulates the actual process of floor consideration in quite exquisite detail. In the House, fast track bars typical obstructionist tactics by, among other things, (1) declaring that a motion to proceed to consideration of the bill is highly privileged and not debatable, (2) limiting debate on the implementing bill to twenty hours, and (3) preventing debate on dilatory motions.⁵⁸ The procedures impose similar constraints on the Senate,⁵⁹ though here they have even greater effect, for the limitation on debate prevents filibusters. Under the normal Senate rules, in contrast, debate can continue indefinitely unless sixty members vote to end it.⁶⁰

The methods that fast track uses to facilitate passage are not unknown in legislative procedure. In fact, they parallel many of the devices the political scientist Barbara Sinclair has identified as elements of increasingly frequent "unorthodox lawmaking" in Congress.⁶¹ The rubric of unorthodox lawmaking embraces a number of practices intended to ease passage of controversial legislation, including the use of restrictive ("closed") rules of debate in the House, "summits" at which key congressional and administration figures hash out compromise bills, and leadership-

⁵⁵ See, e.g., SINCLAIR, *supra* note 11, at 98-99 (citing statistics on delays that beset controversial legislation).

⁵⁶ 19 U.S.C. § 2191(d) (2000).

⁵⁷ See *infra* notes 63-66 and accompanying text (discussing fast track's rationale of enhancing the credibility of U.S. trade negotiators).

⁵⁸ 19 U.S.C. § 2191(f) (2000).

⁵⁹ See *id.* § 2191(g).

⁶⁰ *Supra* notes 42-43 and accompanying text.

⁶¹ See SINCLAIR, *supra* note 11, at 1-8, 79-81, 83-108.

engineered committee bypasses.⁶² A fast track regime brings together a number of these elements. Fast track's limitations on debate and amendment are equivalent to a closed rule issued by the Rules Committee, for example, and its mandatory discharge provision is a form of committee bypass.

The great difference between fast track and other forms of unorthodox lawmaking is that fast track puts the facilitative devices into statutory form. Laws like fast track can be seen as codifying unorthodox lawmaking for particular classes of legislation. That the rules are cast in statutory form is part of what makes fast track valuable, but, as we will see next, it is also the source of potential constitutional difficulties.

B. Statutized Rules and Noncommittal Commitment

Having looked at some of the details of how a fast track regime operates, we can now turn to a more theoretical account of the purpose of fast track regimes and statutized rules more generally. In abstract terms, statutized rules can be understood as devices for preventing Congress from engaging in certain types of procedural opportunism. At the same time, however, Congress believes that the Constitution limits its ability to constrain itself in matters of procedure. As a result, statutized rules can only be described as a curiously noncommittal form of commitment.

1. Fast Track and Commitment

The usual rationale for fast track is that it enhances the credibility of American trade representatives.⁶³ Foreign nations would not negotiate with us, the Bush administration urged, if they knew that any agreement could be "picked apart by protectionist forces in

⁶² See *id.* at 77-79, 101-03 (summits), 93-95 (committee bypass), 95-98 (closed rules in the House).

⁶³ See H.R. REP. NO. 107-249, pt. 1, at 17 (2001) ("[T]rade promotion authority gives U.S. trading partners confidence that an agreement agreed to by the United States will not be reopened during the implementing process."); S. REP. NO. 107-139, at 2 (2002) (noting that Congress's failure to implement Kennedy Round trade agreements damaged U.S. credibility and led to the advent of fast track). The original fast track provisions in the Trade Act of 1974 also relied upon the credibility rationale. See S. REP. NO. 93-1298, at 107 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7253; *Trade Reform: Hearings on H.R. 6767 Before the House Comm. on Ways and Means*, 93d Cong., 1st Sess. 394 (1973) (remarks of Deputy Special Representative for Trade Negotiations William R. Pearce) ("[O]ur trading partners are reluctant to negotiate with us until they have some assurance that agreements can be implemented, and implemented rather promptly.").

Congress.”⁶⁴ Lending credence to that assertion, foreign officials have often insisted that fast track is “essential” to meaningful trade negotiations.⁶⁵ And, in fact, there does appear to be at least some evidence to back up all of the claims of fast track’s importance. As the House Ways and Means Committee noted with concern, our leading trading partners have been busy negotiating scores of free trade agreements in the last decade, but the United States has not reached any significant agreements since fast track expired.⁶⁶ Fast track seeks to build credibility by committing Congress to consider an agreement as-is and without undue delay.

In addition to preventing Congress, or certain of its vetogatekeepers, from scuttling trade pacts through delay or amendment, fast track also guards against another sort of legislative opportunism. The president, after all, is almost certain to sign a bill that implements the treaty his administration negotiated, even if that means acceding to extraneous provisions that he would otherwise scorn.⁶⁷ Knowing this, one could expect legislators to package an administration’s trade agreement with measures they desire, much the same as happens with other “must-sign” bills. Indeed, this dynamic was at work in the bill that re-authorized fast track, which President Bush eagerly swallowed despite the bitter pill of a Democrat-engineered increase in aid to laid-off workers.⁶⁸ Fast track knocks down vetogates, each of which is an opportunity for the

⁶⁴ Helen Dewar, *Senate Approves Trade Authority; Bill Adds Billions for Workers Hurt by Foreign Competition*, WASH. POST, May 24, 2002, at A1.

⁶⁵ Edmund L. Andrews, *Why Isn’t Fast Track . . . Faster?*, N.Y. TIMES, Aug. 18, 2002, at C1 (quoting a senior advisor to the European Union’s chief trade representative); see also Clyde H. Farnsworth, *President Backed on Canada Talks*, N.Y. TIMES, Apr. 24, 1986, at D1 (“Canadian officials had said all along that they would back away from the negotiations without the authority.”); *U.S. Return to Free Trade of Global Benefit*, THE AUSTRALIAN, July 30, 2002, at 10 (“Trade Promotion Authority is crucial because most nations are unwilling to sign off on deals if pork-barrelling protectionists in the U.S. Congress can then waltz in and demand amendments.”).

⁶⁶ H.R. REP. NO. 107-249, pt. 1, at 17.

⁶⁷ This is of course only one example of the general problem of riders. See WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS* 210 (6th ed. 1985). Appropriations bills, as “must-pass” legislation, are most susceptible to such tactics. See, e.g., George Hager, *House Passes Spending Bill; Massive Omnibus Measure Larded with Pet Projects*, WASH. POST, Oct. 21, 1998, at A1. Trade agreements would in most cases fall into the “must pass” category from the president’s point of view.

⁶⁸ Paul Blustein, *Trade Bill to Help Laid-Off Workers; Victims of Imports Win Added Benefits*, WASH. POST, Aug. 3, 2002, at E1. The assistance program appears as Title I of the omnibus Trade Act.

gatekeeper to add pet projects. Seen in its most favorable light, the anti-rider aspect of fast track helps prevent pork-barreling and arguably thereby amounts to a good-government measure in the same vein as the Byrd Rule (which bars extraneous measures from being tacked onto reconciliation resolutions)⁶⁹ or the line-item veto.⁷⁰ So, while fast track is primarily intended to help the president get the trade agreement he wants, it also means that he won't be saddled with *more* than what he wants.

On both the credibility-enhancement and pork-abatement rationales, the idea motivating fast track is an image of a Congress unable to save itself from its own weakness. Congress thinks that freer trade is generally in the nation's long-term best interests, yet it also fears that tomorrow it (or its successors) will hear the siren song of short-sighted protectionist or rent-seeking constituents. Like Ulysses, Congress needs a commitment device, and fast track is that device.⁷¹ In this way, fast track is of a piece with proposals for a balanced-budget constitutional amendment,⁷² as well as with the deficit-control measures at issue in *Bowsher v. Synar*.⁷³ In all of these cases, Congress seeks institutional devices that would compensate for its anticipated lack of political willpower.

⁶⁹ See ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 128 (rev. ed. 2000) (describing the Byrd Rule as a response to the fact that "[b]ecause there is a strong probability that a reconciliation bill will pass once it is initiated, it is an attractive vehicle for provisions that are unrelated to the budget.").

⁷⁰ While the conventional view is that the line-item veto would simply reduce wasteful pork-barrel spending, one should note that this view overlooks the fact that pork-distributing measures are often necessary to grease open the hinges of vetogates and allow a bill to be passed at all. A line-item veto could therefore significantly hinder Congress's ability to strike deals, perhaps reducing the overall volume of legislative activity. See Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 412 (1992). Trade agreements that could not garner a majority in Congress might also benefit from that sort of bundling. It is therefore at least conceivable that fast track could have the perverse effect of making it harder to conclude a trade agreement, contrary to its main purpose.

⁷¹ The classic modern treatment of pre-commitment devices is JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (rev. ed. 1984).

⁷² See Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1116-18 (1998) (discussing a balanced-budget amendment as a form of pre-commitment device).

⁷³ 478 U.S. 714 (1986). The law at issue in *Bowsher* required the Comptroller General to make automatic spending cuts whenever Congress exceeded a statutory deficit cap. *Id.* at 717-18. See also Paul W. Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185 (1986) (conceiving of Gramm-Rudman as a method of binding future Congresses).

Without going into the particular rationale for every regime of statutized rules, a few examples suffice to show that they likely share similar commitment dynamics. Congress knows, for instance, that closing a military base will be bitter medicine for the legislators who represent the base's district and state, even when there is a consensus that some closures are required. Congress therefore created a procedural system whereby it considers closure plans as an unamendable whole, so that no individual legislator can exempt his own local base when the time comes.⁷⁴ Likewise, we can view statutes regulating election contests⁷⁵ as a means of mitigating the risks created by each house's constitutional power to be the judge of its members' qualifications and elections.⁷⁶ If procedures regarding election contests were subject to the whim of the majority of the chamber, members of the minority party would be at risk of a partisan disposition of their disputes. The risk would be ameliorated if the legislature could commit itself to following certain rules ahead of time, before it is faced with a concrete dispute that would evoke party biases. Thus the appeal of statutized rules, which allow a more powerful commitment inasmuch as they can be changed only through the joint will of both houses and the president.

2. *The Disclaimer Clause*

It is at this point that the commitment rationale runs into a problem. Since the value of statutized rules presumably inheres, at least in part, in their ability to commit the House and Senate to a particular course of action, it comes as a bit of a surprise that the code section setting forth the special fast track rules for trade agreements includes a "disclaimer clause" reserving each chamber's freedom to change its mind. According to the statute, the fast track provisions are enacted:

⁷⁴ See Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2908, 104 Stat. 1485, 1816-18 (1990); Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, § 208, 102 Stat. 2623, 2623-33 (1988); see also *Dalton v. Specter*, 511 U.S. 462, 481-82 (1994) (Souter, J., concurring in part) (stating that Congress recognized that base closure was "politically difficult" and so it devised a scheme that would "bind its hands from untying a package").

⁷⁵ See 2 U.S.C. §§ 381-96 (2000).

⁷⁶ See U.S. CONST. art I, § 5, cl. 1. ("Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members . . .").

(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such they are deemed a part of the rules of each House, respectively . . . and they supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to *change the rules* (so far as relating to the procedure of that House) *at any time, in the same manner and to the same extent as in the case of any other rule of that House.*⁷⁷

The disclaimer clause suggests that the special fast track procedures, despite their presence in the U.S. Code, are no different than any other rule of debate. Taken at face value, this clause nullifies the effect of statuting the special rules, rendering trade agreements subject to committee bottle-ups, delaying tactics, amendment battles, and so on—in short, all of the dilatory weapons Congress supposedly wanted to commit itself not to use. Does Congress simply hope that anxious trade partners will overlook this provision?

Fast track's disclaimer clause is rather striking, given the statute's avowed purposes, but the clause is neither novel nor uncommon. Substantially identical language dates back at least to the Reorganization Act of 1939,⁷⁸ which created special legislative procedures for considering President Roosevelt's proposals to restructure the executive branch. Congress usually, but not always, inserts the same language in more recently enacted statuted rules.⁷⁹

⁷⁷ Trade Act of 1974 § 151, 19 U.S.C. § 2191 (2000) (emphasis added). The 2002 Bipartisan Trade Promotion Authority Act incorporates the 1974 Act's fast track provisions by reference. See Pub. L. No. 107-210, § 2103(b)(3)(A), 116 Stat. 933, 1006 (2002) (referring to Trade Act of 1974 § 151). The 2002 Act contains its own substantially identical disclaimer clause that governs several new ancillary fast track procedures it creates. See *id.* § 2105(c).

⁷⁸ Ch. 36, § 21, 53 Stat. 561, 564 (1939). The committee reports on the bill go no further than paraphrasing the section. See H.R. REP. NO. 76-120, at 7 (1939).

⁷⁹ For examples of statuted rules that lack disclaimers, see Aviation Investment and Reform Act, Pub. L. No. 106-181, § 106(c), 114 Stat. 61 (2000) (codified in 49 U.S.C.A. § 48101 note (West Supp. 2002)); Treasury, Postal Service, and General Appropriations Act, Pub. L. No. 104-208, § 628(c), 110 Stat. 3009 (1997); Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 104-52, § 632(c), 109 Stat. 468 (1996); Chief Financial Officers Act of 1990, Pub. L. No. 101-576, § 303(b), 104 Stat. 2838, 2850 (codified in 31 U.S.C. § 3515 note (2000)); Commercial Space Launch Act Amendments of 1988, Pub. L. No. 100-657,

As a result, the bulk of our laws about lawmaking include provisions that render their special statutory procedures no different, and no more legally durable, than any other rule of proceeding.

How can we make sense of this noncommittal commitment? One obvious possibility is that the Congress is just unwilling to commit itself fully. Like someone struggling to quit smoking, it promises up and down to abstain . . . unless it *really* needs a cigarette, in which case all bets are off. That kind of weak-willed reluctance is likely part of the answer, but it is not the whole story. If we take Congress at its word, it appears to believe that a truly binding commitment to fast track, no matter how desirable, is *constitutionally impossible*. The Senate Finance Committee, commenting on disclaimer language identical to that eventually enacted in the recent trade bill, remarked as follows:

[The section permitting either house to change the rules at any time] *simply confirms what is the case* under Article I, section 5, clause 2 of the Constitution of the United States, which provides that “(e)ach House may determine the Rules of its Proceedings. . . .” Because the rules of proceedings in each House are determined by that House and do not require the consent of the other Chamber, each House may change its rules independently of the will of the other Chamber.⁸⁰

The disclaimer clause, on this view, is simply a recognition of an inalienable power of each house to set its own rules as it pleases. That freedom, of course, is what a statutized rule is presumably supposed to constrain, if it is to do its job. But Congress cannot

§ 5(a), 102 Stat. 3900 (codified as amended at 49 U.S.C.A. § 70113(e) (West 1997 & Supp. 2002)).

⁸⁰ S. REP. NO. 107-139, at 54 (2002) (emphasis added). The Conference Report, H.R. CONF. REP. NO. 107-624 (2002), *reprinted in* 2002 U.S.C.C.A.N. 649, does not mention this aspect of the bill. A House Ways and Means Committee Report on a previous version of the bill paraphrases the provisions at issue but offers no commentary. *See* H.R. REP. NO. 107-249, pt. 1, at 43 (2001). Committee reports on other statutes with disclaimer clauses typically do not go beyond merely paraphrasing the clause. When they say more, it is typically just to emphasize that the clause restates a constitutional rule. *See, e.g.*, S. REP. NO. 104-2, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 38, 52 (noting, in connection with the Unfunded Mandate Reform Act’s disclaimer clause, that “[t]he Constitution *already* reserves the rulemaking powers of each House” (emphasis added)).

commit itself to fast track because the Constitution, as it were, forces it to be free. This rather striking proposition in fact accords with the history of Congress's behavior under statutized rules.

3. Congressional Practice Under Statutized Rules

If history is a reliable guide, the disclaimer clause is probably unnecessary. The sentiment that the clause expresses—that Congress may not impair its rules power by statute—finds overwhelming support in past parliamentary practice. For while statutes regulating internal procedures have a long history, so too does Congress's belief that it may ignore them, even in the days before the disclaimer clause. For instance, as the 36th Congress was organizing itself in February 1860, Representative Whitely of Delaware objected that it was out of order for the House to adopt rules of proceedings before swearing in the clerk. The basis of his point of order was a 1789 statute concerning the administration of oaths at the beginning of new sessions.⁸¹ The law provided, among other things, that the Speaker should administer the oath of office to the other members and the clerk "*previous to entering on any other business.*"⁸² Notwithstanding the 1789 Act, the Speaker overruled Whitely's point of order, relying on the House's history of adopting rules before selecting a clerk.⁸³

Other precedents from the same period demonstrate that the issue was perceived to be of constitutional dimensions. In 1861, for instance, the House Judiciary Committee considered a bill that would have regulated the election of officers at the beginning of each Congress. The Committee's report concluded that the bill would violate the Rules of Proceedings Clause.⁸⁴ The question of the

⁸¹ Act of June 1, 1789, ch. 1, 1 Stat. 23.

⁸² *Id.* § 2 (emphasis added). The modern version of this provision is codified at 2 U.S.C. § 25 (2000).

⁸³ 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 245 (1907) [hereinafter HINDS' PRECEDENTS].

⁸⁴ *Id.* § 82. At around the same time, the great parliamentarian Cushing noted that the constitutionally troubling aspects of such statutes had also been a topic of debate in the state legislatures:

The principle, that each branch of a legislative assembly has a right to determine its own rules, is deemed so important that where it is inserted into the constitution of a State, it has been doubted, whether it was competent for the legislature of such State, by law, to provide rules for the

permissibility of passing a law that would set the procedures for the election of officers had evidently been a matter of contention for some years.⁸⁵

Bringing us nearer the precise problem presented by fast track, an 1855 bill establishing the Court of Claims provided a special procedure by which the legislature would consider bills appropriating funds to compensate victorious claimants.⁸⁶ In particular, bills were to remain on the calendar from Congress to Congress until finally acted upon.⁸⁷ In 1858, however, when a debate arose over whether the current House was bound by that law, the Speaker ruled that the bills would not continue on the calendar as provided in the statute.⁸⁸

There does appear to be a narrow exception to the general practice of ignoring statutized rules. House precedents take the view that the House is bound to follow procedures set forth in statutes to which it assented earlier in the *same* session, despite its usual power to change the rules by itself whenever it pleases.⁸⁹ The standard disclaimer clause gives no indication of trying to avail itself of this two-year commitment, however, for it provides that the statutized procedures can be changed “at any time, in the same manner, and to the same extent” as other rules.⁹⁰ In any case, two years would rarely be long enough to authorize, negotiate, conclude, and implement a round of trade agreements. The 2002 fast track reauthorization in

government of its respective branches, which should bind them and supercede their authority to make rules for themselves.

LUTHER STEARNS CUSHING, *ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA* § 614, at 247 (Fred B. Rothman & Co., 1989) (1856).

⁸⁵ 5 HINDS' PRECEDENTS, *supra* note 83, § 6765 (noting an 1841 debate that “brought up again the point as to whether the inherent right of either House to elect its own officers might be modified or limited by law”).

⁸⁶ Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

⁸⁷ *Id.* § 8, 10 Stat. at 614.

⁸⁸ 4 HINDS' PRECEDENTS, *supra* note 83, § 3298.

⁸⁹ 2 *id.* at § 1341; 5 *id.* at §§ 6767-68. These precedents concern whether the House could deviate from statutory procedures for counting the 1877 electoral vote. The reporter notes that “this law had been passed by this House, so the question as to the right of Congress to bind by law a succeeding House in a matter relating to its procedure, did not arise.” 5 *id.* § 6768, at 890 n.6.

⁹⁰ *E.g.*, 19 U.S.C. 2191(a)(2).

fact provides for fast track procedures until July 2005, with the built-in opportunity for a further two-year extension.⁹¹

The Senate shares the House's suspicion of statutized rules. The Reorganization Act of 1946⁹² regulates committee jurisdiction and membership along with procedural rules. The Senate's parliamentary precedents nonetheless hold that the Senate may change the Act's provisions relating to internal Senate affairs through a simple (one-house) resolution, and, in fact, the Senate has "amended" the Act in just that way.⁹³ This despite the fact that Congress has also amended the 1946 Act through legislation.⁹⁴ Legislators thus appear to enjoy a choice of two different methods to amend such laws: one route through bicameralism and presentment, the other through simple (i.e. one-chamber) resolution.

Of course, one should be careful not to overstate the clarity of the historical precedents here. Presiding officers have sometimes felt unsure of themselves when faced with conflicts between statutes and the rules power, preferring to work around the difficulty rather than face it head on.⁹⁵ Congress has expressed concern over whether it retains the ability to alter statutized rules as recently as 1983.⁹⁶ Furthermore, the very fact that Congress has such a long history of passing such statutes—statutes that especially in the early days did not contain disclaimers—perhaps lends *some* degree of support to the permissibility of setting rules by statute. This type of argument from past practice is especially plausible considering that statutized procedures date back to the very first Congress, which included among its members a number of delegates to the Philadelphia convention.⁹⁷

⁹¹ Trade Act of 2002, Pub. L. No. 107-210, § 2103(c)(1), 116 Stat. 933, 1006-08 (2002).

⁹² 60 Stat. 812 (1946). The Act contains a disclaimer clause, § 101, 60 Stat. at 814.

⁹³ RIDDICK'S SENATE PROCEDURE [S. Doc 101-28] 1219-20 (Alan S. Frumin ed., 1992); *see* S. RES. 274, 96th Cong. (1979) (amending Senate rules regulated by 1946 Act).

⁹⁴ *See, e.g.*, Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140; An Act to Amend the Legislative Reorganization Act of 1946, ch. 9, 63 Stat. 6 (1949).

⁹⁵ In 1871, Speaker Blaine was unable to decide how to reconcile the House rules regarding committee membership with a conflicting statute, and so he asked the whole House to resolve the matter. The House decided to amend the rules to conform to the statute. *See* 5 HINDS' PRECEDENTS, *supra* note 83, § 6766.

⁹⁶ *See* H.R. REP. NO. 98-257, pt. 3, at 5 (1983). The Rules Committee therefore recommended that disclaimer clauses be used to dispel any lingering doubts. *Id.*

⁹⁷ *Cf. Myers v. United States*, 272 U.S. 52, 174-75 (1926) (according "the greatest weight" to the opinions of the first Congress concerning its views of the constitutionality of legislation structuring the newly founded government).

Nonetheless, whatever doubts might occasionally be entertained, both chambers of Congress appear to have come quite firmly to believe that the Constitution grants them the prerogative to abrogate by unilateral action any statutory provision that concerns internal affairs within the purview of the rules power. Their parliamentary guides are confident on the matter, stating that it “has been settled that Congress may not by law interfere with the constitutional right of a future House to make its own rules.”⁹⁸ It is notable that the disclaimer clauses that Congress now inserts in the large majority of such statutes do not present themselves as *creating* an escape hatch for a later Congress; on the contrary, these clauses merely “*recogni[ze]*” a chamber’s “constitutional right” to change the rules.⁹⁹ To the extent that committee reports discuss the issue at all, the legislators contend that the clause “simply confirms what is the case.”¹⁰⁰

4. *What’s Left of the Rationale*

Given the history and views discussed above, it is hardly surprising that Congress has seized upon disclaimer clauses when political exigencies make it desirable to abrogate a deal worked out in an earlier fast track statute. In 1986, for example, while the House was considering President Reagan’s request for additional aid to the Nicaraguan Contras, Representative Lott objected that the resolution had not been introduced in the manner required by the statute governing requests for aid. Speaker O’Neill, noting that the statute recognized the House’s power to change its rules at any time,

⁹⁸ HOUSE MANUAL, *supra* note 9, § 388. While my primary concern is with federal practice, one should note that conflicts between statutes and legislative rules also arise in the states, where the authorities generally agree with Congress’s view. *See, e.g.,* Coggin v. Davey, 211 S.E.2d 708, 710-11 (Ga. 1975) (holding state “Sunshine Law” inapplicable to state legislature, which had adopted rules contrary to it); Des Moines Register & Tribune Co. v. Dwyer, 542 N.W.2d 491 (Iowa 1996) (similar). These conflicts sometimes arise in the context of initiative statutes submitted to the voters. *See* People’s Advocate, Inc. v. Superior Court, 181 Cal. App. 3d 316 (1986) (invalidating portions of a ballot proposition that regulated the legislature’s internal procedures); Paisner v. Att’y Gen., 458 N.E.2d 734 (Mass. 1983) (holding that such a measure exceeded the people’s initiative power); James E. Castello, Comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 CAL. L. REV. 491 (1986).

⁹⁹ Trade Act of 2002, Pub. L. No. 107-210, § 2105(c)(2) (emphasis added).

¹⁰⁰ S. REP. NO. 107-139, at 54 (2002); *see also* H.R. REP. NO. 98-257, pt. 3, at 5 (1983) (noting the view of some committees that the disclaimer clause is unnecessary because the power to change statutorily rules derives from the Constitution).

decided that debate would be governed by the rule reported by the Rules Committee, not by the special procedures the statute provided.¹⁰¹ Congress has relied on the disclaimer clause to escape inconvenient statutized rules in other instances as well, and the courts have been unwilling to intervene.¹⁰² Perceptive commentators are therefore keenly aware of fast track's legal limitations.¹⁰³

Congress's asserted constitutional right to change the rules in disregard of statutory directives—not to mention its history of having done so when it really wants to—plainly does not bolster fast track's credibility rationale. All the same, it does not render the statute wholly nugatory; it does have some, albeit more modest, effect. For one thing, even if Congress is free to evade fast track rules, the existence of such rules might still have substantial force as a *de facto* commitment device in many cases. The statutized rule in effect establishes default rules for the consideration of trade agreements; opponents then have the burden of overcoming the inertia behind the statutized procedures. And as we will see later, the procedural status quo can be a powerful force, at least in the Senate.¹⁰⁴

The fast track statute also has an important political dimension. A vote to kill the fast track procedures would be far more publicly understandable than are the myriad obscure procedural machinations that can derail legislation in the ordinary legislative process. Thus, even if fast track rules can be changed like any other

¹⁰¹ For descriptions, see Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT'L L. 69, 99 n.141 (1988); and Edmund Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT'L L.J. 471, 507-10 (1990).

¹⁰² In 1981, for example, the House deviated from the Alaskan Natural Gas Transportation Act's rule, 15 U.S.C. § 719f(d)(5)(B), that no resolution approving a presidential recommendation to waive regulatory requirements could be considered within sixty days of another resolution concerning the same presidential recommendation. In debate, Representative Long referred to the disclaimer clause to justify circumventing the rule. See *Metzenbaum v. Fed. Energy Regulatory Comm'n*, 675 F.2d 1282, 1284-86 (D.C. Cir. 1982) (describing the incident). In the subsequent suit challenging the propriety of the House's consideration of the waiver resolution, the D.C. Circuit ruled that it lacked jurisdiction because the case presented a political question. *Id.* at 1286-88. On the justiciability of legislative rules of procedure more generally, see Michael B. Miller, Comment, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CAL. L. REV. 1341 (1990); and Gregory Frederick Van Tatenhove, Comment, *A Question of Power: Judicial Review of Congressional Rules of Procedure*, 76 KY. L.J. 597 (1987).

¹⁰³ See, e.g., Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 151 (1992) (noting "the oft-overlooked fact that, as a legal matter, the Fast Track 'emperor' has no clothes: the statutory Fast Track procedures that modify internal house rules in no way legally 'bind' Congress").

¹⁰⁴ See *infra* notes 125-130 and accompanying text.

rule, a vote on a resolution to do so would be a politically salient event, especially since it would likely mean the rejection of the president's trade agreement.¹⁰⁵ Accordingly, even while noting its right to ignore fast track, Congress also points out its past good behavior in refraining from exercising its purported constitutional powers: "Historically, when fast track legislation has been in place for trade agreements, neither House has ever acted unilaterally to withdraw application of fast track procedures."¹⁰⁶ In other words: Trust us, we've never let you down before. Having made such a promise, breaking it could have significant reputational effects. Of course, as we have just seen, Congress has in fact sometimes taken advantage of disclaimer clauses in other contexts. It is hard to believe that Congress would keep this promise if legislators and their constituents strongly disfavored a trade agreement; but, as history seems to suggest, fast track at least affects a loose *de facto* commitment.

* * *

Enacting a fast track statute is not wholly pointless, and a president who lobbies for it is not irrational; at the margin, the presence of the statutized rules increases the probability of successfully implementing a free trade pact. And yet fast track is not nearly the powerful tool that one who is unaware of the disclaimer clause (and congressional practice) might suppose. The reason why the scheme is hobbled, if we are to believe Congress, is that the Constitution forbids the legislature from enacting a truly binding statutized rule. A good deal thus hangs on that constitutional claim. The rest of this paper explores whether Congress's view is correct and, if so, why. What is wrong with Congress choosing to use its legislative powers to create a regime of statutized rules?

For purposes of the argument in the next Part of the paper, it is important to note the language with which Congress has typically expressed the problem with statutized rules. The precedents couch the issue in terms of one house "binding" its successors.¹⁰⁷ Commentators who have discussed such rules use the same

¹⁰⁵ Cf. Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 KANS. L. REV. 1113, 1163-68, 1173-74 (1997) (arguing that the Unfunded Mandates Reform Act's procedural requirements can have a significant political effect even though they are legally waivable).

¹⁰⁶ S. REP. NO. 107-139, at 54 (2002).

¹⁰⁷ See, e.g., 4 HINDS' PRECEDENTS, *supra* note 83, § 3298; 5 *id.* § 6768, at 890 n.6.

entrenchment-tinged idiom.¹⁰⁸ The perceived problem with such laws is that they amount to a cross-temporal power-grab, one Congress attempting to entrench its preferences against another.

If binding one's successors is the problem with fast track, then there should not be any problem with the legislature being bound by a statutized rule passed during the same session. Parliamentary precedents, in fact, suggest exactly that view, holding that the House is bound to follow procedures set forth in statutes to which it assented earlier in the same session, despite its usual unilateral power over its rules.¹⁰⁹ Thus, one can see the outlines of a coherent critique of fast track that would be rooted in a norm of anti-entrenchment. The next Part scrutinizes fast track through the lens of entrenchment. As we will see, however, the entrenchment-based critique of fast track runs into a number of puzzles.

II. THE ENTRENCHMENT CRITIQUE

When one looks at fast track from a suitable distance, what one sees is a Congress that wants to commit itself (if perhaps reluctantly) to a future course of conduct that it knows might be unpalatable when the time for action comes. In this way, fast track is similar to measures such as the Gramm-Rudman-Hollings deficit control law, and, even more broadly, constitution-making. And if Ulyssean commitment is the point of fast track, then the natural source of criticism is the anti-entrenchment norm, which, as elaborated upon below, forbids one legislature from binding its successors. As we saw earlier, Congress's own self-understandings also impel one toward an entrenchment-focused critique, for its precedents use the anti-entrenchment idiom and track its results. The implication of the anti-entrenchment norm, it would appear, is that Congress cannot bind itself to follow statutized rules despite the tremendous benefits that commitment might bring. Thus we are left with the unavoidable

¹⁰⁸ See, e.g., Kahn, *supra* note 73, at 225-27; Vasan Kasavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653, 1779-81 (2002). An exception is Adrian Vermeule, who suggests that the separation of powers may provide more fertile grounds for objection. See Adrian Vermeule, *The Constitutional Law of Congressional Procedure* 52 (University of Chicago Public Law and Legal Theory Working Paper No. 39, Feb. 2003), available at <http://www.law.uchicago.edu/academics/publiclaw/index.html>.

¹⁰⁹ See *supra* note 89 and accompanying text.

result recognized by the disclaimer clause: fast track rules can be changed like any other rule.

This Part begins by briefly canvassing the types of entrenchment that fast track might possibly implicate. I then argue, contrary to the conventional view, that fast track is not entrenching, or, at any rate, not impermissibly entrenching.

A. *Categorizing Entrenchment*

Professors Posner and Vermeule, in a recent essay on the subject, define entrenchment as “the enactment of either statutes or internal legislative rules that are binding against subsequent legislative action in the same form.”¹¹⁰ The word “binding” is used here in a narrow legal sense, for while some laws might be irrepealable as a matter of political reality—the core social security statutes come to mind, for instance—the more constitutionally interesting form of entrenchment is *de jure* entrenchment. Social security, therefore, is not (legally) entrenching, as it does not contain legal provisions that block its amendment or repeal. A statute that purported to establish permanent and unamendable tax rates, on the other hand, would be entrenching, since such a law would seek to prevent future legislatures from altering its directives.

Entrenchments can be categorized along at least two dimensions. Along the first dimension, one can classify them according to the *magnitude* of the attempt to entrench. A directive could purport to forbid its repeal or amendment altogether, for example, or it might merely condition amendment upon burdensome procedures, such as a supermajority vote or the votes of two successive sessions; similarly, the entrenching effect might claim to be permanent, or, in a weaker entrenchment, the directive might claim to be irrepealable only for a particular length of time.¹¹¹ Along the second dimension, one can divide entrenchments based upon the *type of directive* being entrenched, such as statutes (“legislative entrenchment”), parliamentary rules (“rules entrenchment”), and so on.

¹¹⁰ Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1667 (2002).

¹¹¹ Cf. Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. BAR FOUND. RES. J. 379, 384-85 (1987) (distinguishing modes of entrenchment along similar lines and providing examples).

In our system, entrenched legislation is a rare creature, for it is almost universally regarded as impermissible.¹¹² In probably the leading Supreme Court case on the topic, *Newton v. Commissioners*,¹¹³ the Court was confronted with a state statute that purported to “permanently establish[]” a certain town as the county seat of Mahoning County, Ohio. The Court could not countenance such a result, for each session of the legislature is equally dignified, regardless of its temporal position:

Every succeeding legislature possesses the same jurisdiction and power with respect to [public interests] as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.¹¹⁴

The opinion leaves the constitutional source of the anti-entrenchment norm uncertain, as do the few other cases that have touched on the issue.¹¹⁵ The Court treats it as quite obvious that one

¹¹² *But see* Posner & Vermeule, *supra* note 110 (questioning the dominant view).

¹¹³ 100 U.S. 548 (1879).

¹¹⁴ *Id.* at 559.

¹¹⁵ *See, e.g.*, *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932); *Manigault v. Springs*, 199 U.S. 473, 487 (1905); *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 621 (1899). The leading academic defense of the anti-entrenchment rule is Julian Eule, *supra* note 111. Eule locates the prohibition in “the spirit” of the clauses of the Constitution that provide for elections every two years for Representatives and every six years for Senators, which show that the people endow their representatives with a limited temporal mandate. *Id.* at 405; *see also* John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003) (providing an originalist defense of the anti-entrenchment rule). For a (skeptical) discussion of possible justifications for the anti-entrenchment rule, *see* Posner & Vermeule, *supra* note 110, at 1673-93.

legislature cannot impose its will on its successors, sometimes stating the proposition without citing any authority at all.¹¹⁶

If one wishes to make an enactment resistant to subsequent legislative action, then one can pass it as a constitutional amendment. A chief virtue of constitutions is that they lay down basic ground rules that cannot be changed through ordinary politics and run-of-the-mill legislation. Thus, the very idea of constitutionalism is, in a broad sense, an exercise in pre-commitment, a close cousin of entrenchment.¹¹⁷ Yet a constitution is not itself truly entrenching unless it purports to be binding against future action *in the same form*. The U.S. Constitution, in contrast, explicitly provides procedures for its own amendment in Article V—with a few key exceptions: Certain provisions relating to slavery could not be changed at all until 1808, and no amendment can deprive a state of equal representation in the Senate without its consent.¹¹⁸ Thus the Constitution's directives are insulated vis-à-vis ordinary lawmaking, but they are not, by and large, really entrenched. One can also speak of internal parliamentary rules being entrenched, though, as with legislative entrenchment, actual examples are thin on the ground. In 1995, the newly Republican House of Representatives, as part of its "Contract with America," established a rule requiring a sixty-percent majority in order to pass any bill that raises taxes.¹¹⁹ This rule is perhaps unwise, and, at least in the estimation of several prominent commentators, it is unconstitutional because of its anti-majoritarian voting requirement.¹²⁰ Whether it is an example of an *entrenching* rule depends upon whether repeal of the rule by a subsequent Congress could be effected in the same way the rule was passed: by a mere majority. The ability to repeal the supermajority requirement by a

¹¹⁶ See, e.g., *Manigault*, 199 U.S. at 487; see also Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 191 (1972) (calling the rule "so obvious as rarely to be stated").

¹¹⁷ On constitutions as pre-commitment devices, see, e.g., STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 135 (1995).

¹¹⁸ U.S. CONST. art. V.

¹¹⁹ See H.R. Res. 6, § 106(a), 104th Cong. (1995) (enacted). The current version is codified as Rule XXI(5)(b).

¹²⁰ Bruce Ackerman et al., *Comment: An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995); Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996). But see John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995) (arguing that the rule is constitutional).

mere majority would obviously erode most of the rule's legal (though not necessarily political) importance. Nonetheless, the overwhelming suspicion that surrounds entrenchment leads even the most persistent academic supporters of the Republicans' rule to concede that a majority vote suffices to repeal it.¹²¹ The House's parliamentary practices confirm that a special rule from the Rules Committee, adopted by a majority, trumps the supermajoritarian requirement.¹²² So this rule does not entrench itself, but it at least shows us what rules entrenchment would look like. This is important since, as discussed below, fast track could be accused of effecting a rules entrenchment.

B. How Fast Track Does Not Impermissibly Entrench

How does fast track fit into the entrenchment picture? Statutized rules certainly have an air of entrenchment about them, and, as noted above, the anti-entrenchment idiom is the conventional way of explaining why later legislatures may permissibly ignore them. Why else put procedures into statutes, one would think, if not to try to bind future Congresses to follow those procedures? By enacting a law regulating internal procedures, one session of Congress tries to force its successors to follow certain rules of debate. And that is precisely what the anti-entrenchment norm says is forbidden.

Natural as that line of reasoning would appear, I do not believe it succeeds in showing that a binding fast track regime is impermissible. To begin with, fast track statutes are *not*, strictly speaking, really entrenching at all, even when they lack any sort of escape clause. The hallmark of entrenchment is the enactment of a directive that can be changed only by a process more burdensome than that which created it. Yet the statute setting forth the special fast track procedures does not purport to be irrevocable by a future statute. It can be amended or repealed just like any other. It is therefore not, in the language of the Posner/Vermeule definition,¹²³ an enactment that is "binding against subsequent legislative action in the same form." The statute is durable as against a *different* (and presumably

¹²¹ McGinnis & Rappaport, *supra* note 120, at 500-507.

¹²² HOUSE MANUAL, *supra* note 9, § 1067; *see also* Skaggs v. Carle, 110 F.3d 831, 835 (D.C. Cir. 1997) (listing several occasions on which the rule has been abrogated by House majorities).

¹²³ Posner & Vermeule, *supra* note 110, at 1667.

less weighty) form of enactment—in this case, internal resolutions of one chamber—but the fast track statute does not condition its own amendment upon a procedure more arduous than that which produced it. Whatever other issues might be lurking, the general proposition that a statute cannot be amended by a resolution of one house should not be problematic from the point of view of entrenchment. On the contrary, the proposition seems, if anything, compelled by *Chadha*.¹²⁴

It is true, of course, that enacting a (statutorily amendable) fast track law has some impact on how subsequent legislatures conduct their affairs—that's presumably part of the point. The statute establishes expedited procedures as the default rules of debate. A later Congress must act affirmatively to change those rules. But this burden on later legislators does not offend the Constitution, for all legislation—or rather, all legislation that lacks a sunset clause—has this kind of *de facto* entrenching effect of establishing a new status quo.

If fast track can properly be said to implicate any kind of entrenchment, it could only be *rules* entrenchment, not the more familiar *legislative* entrenchment. We could think of fast track as an otherwise ordinary procedural rule that had the peculiar feature of being amendable only if both houses jump through the hoops of Article I, Section 7; to the extent that its peculiar mode of amendment makes the rule harder to change, it could be considered a mild form of rules entrenchment. As the discussion of the Contract with America tax rule showed, there is a strong suspicion of procedural rules that appear to entrench themselves against later repeal or amendment. Nonetheless, on a closer look, the case against rules entrenchment is in fact not nearly so strong as the case against legislative entrenchment, either in terms of parliamentary practice or in terms of constitutional logic.

Let us begin with parliamentary practice, where the situation differs importantly between the two chambers. Reflecting its general view that current majorities should work their will in matters of procedure, the House of Representatives adopts its rules by majority vote at the beginning of each session.¹²⁵ Once adopted, the rules are

¹²⁴ See *infra* notes 170-180 and accompanying text (examining *Chadha's* relevance).

¹²⁵ WILLIAM HOLMES BROWN, *HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 807-08* (1996). Before adopting rules at the beginning of a new

subject to amendment or repeal during the session in generally the same way as the House deals with any other matter.¹²⁶ (Of course, the House would ordinarily not go so far as to amend the standing rules; the procedures governing any particular piece of legislation can be changed by a special rule from the Rules Committee.) In contrast, under Senate Rule V, the rules of the Senate continue in effect from one session to the next unless they are changed “*as provided in these rules.*”¹²⁷ Turning to Rule XXII, one finds that ending debate on a motion to change the rules requires the agreement of two-thirds of those present and voting.¹²⁸ The combined effect of these two rules, therefore, is that the rules of the Senate, including the filibuster-enabling supermajority cloture rule itself, persist from session to session unless a supermajority can be found to change them.¹²⁹ As one of the leading authorities on entrenchment puts it, “No better illustration of entrenchment could be offered.”¹³⁰

session, the House operates under the general parliamentary law described in Jefferson’s *Manual*, which incorporates the principle of majority rule. See HOUSE MANUAL, *supra* note 9, §§ 60, 508. The House takes the view that one session may not attempt to extend its rules into a subsequent session against the latter’s will. *Id.* §§ 59, 388; 5 HINDS’ PRECEDENTS, *supra* note 83, §§ 6743-47.

¹²⁶ The Rules Committee has jurisdiction to report resolutions amending the standing rules, which resolutions would require only a majority to pass. If the committee failed to report a resolution, a majority of the whole House (not of the quorum) could discharge it from the committee. See McGinnis & Rappaport, *supra* note 120, at 500-03 (describing routes by which the rules can be changed).

¹²⁷ SEN R. V (emphasis added).

¹²⁸ The cloture rule for ending debate on a motion to change the rules thus differs from the usual cloture rule for substantive legislation, which requires the vote of three-fifths of those duly chosen and sworn. See SEN R. XXII.

¹²⁹ The prospects of such a change occurring are very small. The party that finds itself in the minority in a particular session will have a strong incentive to maintain the status quo, for the filibuster is the minority’s main weapon. Accordingly, we can expect the minority party to filibuster any motion to amend Rule XXII’s supermajority cloture rule. The majority party could defeat such a filibuster only in the unlikely event that it could win the votes of two-thirds of those present and voting, but a majority with that degree of dominance would have relatively little need to change the rules, for it could easily defeat any filibuster throughout the session.

¹³⁰ See Eule, *supra* note 111, at 410; see also Fisk & Chemerinsky, *supra* note 42, at 246 (“The Senate that adopted Rule XXII bound all Senates in the future and made change of the Senate’s Rules extremely difficult.”); Posner & Vermeule, *supra* note 110, at 1694 (calling the Senate’s cloture practices “[a] classic entrenchment”). There is a slight complication in that the supermajoritarian cloture rule, first adopted in 1917 and amended several times since then, was in fact a reform intended to make it *easier* to close debate than had previously been possible. See Eule, *supra* note 111, at 407 & nn.129-30; Fisk & Chemerinsky, *supra* note 42, at 195-99. At no point did a bygone majoritarian Senate simply decide that henceforth cloture would require a supermajority. Therefore, Fisk and Chemerinsky are not quite on target when they speak of “the Senate that adopted Rule XXII” binding its successors to a supermajoritarian

In the view of Professors Fisk and Chemerinsky, who have undertaken a careful study of the filibuster's constitutionality, and of Professor Eule, an authority on entrenchment, the Senate's current regime of filibuster-preserving filibusters *ought* to be unconstitutional precisely on entrenchment grounds.¹³¹ This anti-entrenchment argument received a significant airing in the Senate a few decades ago.¹³² It was also a theme during recent discussions criticizing the Senate's judicial confirmation process.¹³³ But when squarely faced with votes on the question in 1967, 1969, and 1975, Senate majorities upheld the principle that a simple majority cannot invoke cloture on a motion to change the rules.¹³⁴ As things actually stand, therefore, the legality of rules entrenchment appears, in the Senate, quite well-settled.

Rules entrenchment is quite attractive in some ways. While legislative entrenchment of substantive policies—such as a permanent statutory ban on new taxes or spending—could soon prove disastrous, I would suggest that entrenchment is not necessarily so troubling an idea when it comes to a chamber's internal rules and procedures. For while it would often be extremely unwise for one legislature to set policy for all eternity, much of the justification for having a constitution—a justification that a constitutionally based anti-entrenchment norm cannot reject—is based on the value of locking in a few fundamental ground rules. The point of a constitution is that its directives are resistant to the whims of transitory bare majorities who would seek to reconfigure the government to suit their aims. A chamber's rules of proceedings

rules regime. So although the filibuster is plainly anti-majoritarian (so too the Senate, of course), it provides only an impure example of entrenchment.

¹³¹ Eule, *supra* note 111, at 411; Fisk & Chemerinsky, *supra* note 42, at 247-52.

¹³² Fisk & Chemerinsky, *supra* note 42, at 210-11. For a more comprehensive history of efforts to change the Senate rules regarding cloture, see BINDER & SMITH, *supra* note 42, at 161-85.

¹³³ See, e.g., *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property of the Senate Comm. on the Judiciary*, 108th Cong. (2003).

¹³⁴ See BINDER & SMITH, *supra* note 42, at 176-82; Eule, *supra* note 111, at 410-11; Fisk & Chemerinsky, *supra* note 42, at 212-13. Regarding the 1975 vote, Binder and Smith suggest that a majority actually favored simple majority cloture for changing the rules but that the reformers surrendered that position in order to win reform of the cloture rules regarding business other than changes in the rules. BINDER & SMITH, *supra* note 42, at 181-82. Whatever the motivations, the outcome was that a majority of the Senate voted against allowing a simple majority to end debate on changing the rules.

are, in a real sense, its very own constitution, and the same considerations typically adduced with regard to the value of constitutional ground rules suggest as well the value of entrenching some internal procedures. (Indeed, doesn't the fact that the chambers keep voluminous records of internal procedural precedents suggest that they do not view their rules as solely the creatures of current majorities?)

While the Rules of Proceedings Clause grants a vast authority over parliamentary structure and procedure, the Constitution itself establishes a number of parliamentary basics ranging over topics from quorum rules to expulsion of members.¹³⁵ This is a perfectly understandable thing for sophisticated framers to do. With regard to the expulsion power, for example, Madison feared that factional passions might lead to abuses, and so the Convention constitutionalized a supermajority rule.¹³⁶ The Constitution has not provided means of protecting against all of the potential abuses, however. One would not want one session's bare majority to change the rules so as to eliminate the minority's committee positions, for instance, but the Constitution does not explicitly forbid such an event.¹³⁷ Where the Constitution has not provided a safeguard, a statute regulating internal procedures could be valuable as a second-best defense, inasmuch as the abuse would have to be ratified by the other chamber and the executive.¹³⁸

The point of the foregoing is simply to point out that rules entrenchment finds some support in legislative practice and, moreover, finds support in the same political logic that undergirds constitutionalism. These considerations tend to diminish the force of the anti-entrenchment attack on a binding fast track regime, and I find them quite compelling. Nonetheless, even if one insists that

¹³⁵ See Vermeule, *supra* note 108.

¹³⁶ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 254 (Max Farrand ed. 1966) [hereinafter RECORDS] (Aug. 10, 1787).

¹³⁷ A much less egregious attempt to diminish the minority party's committee influence was at issue in *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983). Republicans charged that Democrats gave them fewer committee seats than the number to which they were proportionately entitled. While Republicans were 44.14% of the House, they received only 40% of the seats on the Budget Committee and the Appropriations Committee, 34.29% of the seats on the Ways and Means Committee, and 31.25% of the seats on the Rules Committee. *Id.* at 1166. The court refused to adjudicate the dispute. *Id.* at 1176-77.

¹³⁸ As noted earlier, there are statutes regulating committee structures, but these have been "amended" outside of the statutory process. See *supra* notes 92-94 and accompanying text.

rules entrenchment is strictly constitutionally prohibited, one can still resist the conclusion that the disclaimer clause is the mandated response. For, as it turns out, the putative escape hatch recognized by the disclaimer clause would likely fail to prevent entrenchment. Indeed, it might lead to rules that are no less entrenched than they would be under a legally binding (but statutorily amendable) fast track regime.

That last claim probably sounds counterintuitive, given that the disclaimer clause is supposed to reaffirm the constitutional freedom of each chamber to act, unilaterally, as it pleases. The disclaimer, recall, provides that each body may change fast track rules “at any time, in the same manner, and to the same extent as any other rule of that House.” In the Senate, however, to change the rules “in the same manner” as any other rule of the Senate just means to follow Rules V and XXII. As discussed above,¹³⁹ these rules together have the effect of requiring the assent of two-thirds of those present and voting in order to end debate on a motion to change the rules (versus the assent of three-fifths of those duly sworn required to end debate on substantive legislation). This is a serious burden, as attempts to end the super-majoritarian cloture rule suggest.¹⁴⁰ Indeed, it is very possibly more difficult to change the Senate rules via the Senate’s normal internal process than it is to change them by the relatively more majoritarian statutory route that produced fast track in the first place.¹⁴¹ If so, then the route recognized in the disclaimer clause does not permit rules to be changed by a less onerous procedure than that which produced them. So which regime of statutized rules would be guilty of entrenchment: a “non-binding” version that contemplates action through the Senate’s rules process, or a “binding” version that permits amendment only via Article I, Section 7?

¹³⁹ See *supra* text accompanying note 129.

¹⁴⁰ See Fisk & Chemerinsky, *supra* note 42, at 209-13 (recounting attempts to liberalize the cloture rule).

¹⁴¹ A roughly parallel situation is the choice between treating an international agreement as a treaty—which requires two-thirds of the Senate—versus treating it as a congressional-executive agreement—which is implemented through the ordinary legislative process. The latter is generally thought to be the easier route. See *infra* note 218. Of course, the president would likely want to veto any bill that changed his fast track authority, in which case taking the route of ordinary legislation would require two-thirds of both houses. Yet, as discussed above, see *supra* notes 67-70 and accompanying text, Congress can package legislation so as to frustrate the president’s veto ambitions.

These are just more puzzles, not answers. But what the puzzles suggest is that norms of anti-entrenchment cannot yield a coherent explanation of what, if anything, is wrong with setting rules by statute. Fast track can implicate only rules entrenchment, not legislative entrenchment. But, as we have just seen, it is not so clear that our practices actually condemn rules entrenchment, and it is disputable whether rules entrenchment really should trouble us in the same way as its statutory cousin. Finally, if one does not like hard-to-change rules, it does not seem that fast track scores worse in that regard than does the alternative, at least in the Senate.

All the same, even after hearing the arguments adduced above, statutized rules like fast track still seem to have some air of entrenchment about them. It is true that the statutized rule can be amended or repealed like any other statute. Later legislatures are unimpaired in that regard. But the enactment of a binding statutized rule would nonetheless do something that looks suspiciously like entrenchment because it appears to diminish the stature of later legislatures. What it would do is change the domain in which Congress sets (some of) its rules of debate: Control over the affected rules would move from the domain of single-chamber procedural resolutions to the domain of statutes. This is an important change. The position of a later Congress is indeed different from that of its predecessors in this regard. But what kind of a change is this? Congress and commentators couch the issue in terms of the impermissibility of one Congress binding a subsequent Congress, but that is not the real problem with such a shift in the means of governing debate. The problem here is not the balance of power between this Congress and a later one but rather the balance of power between Congress and the president—that is, the separation of powers. Statutizing the rules invites the president into an area that, as a matter of constitutional law, he has no business being. The next Part of the paper aims to show that considerations associated with the separation of powers give us a more satisfying view of what seems troubling about statutized rules.

III. THE RULES OF PROCEEDINGS CLAUSE AND SEPARATION OF POWERS

Contemporary commentary on separation of powers has largely come to focus on the Constitution's Vesting Clauses.¹⁴² When one looks at a potential separation of powers problem through the lenses of these clauses, the important questions inevitably become questions about function.¹⁴³ First we ask which one of the Constitution's three functionally identified powers—legislative, executive, or judicial—describes a certain activity. With that answer in hand, we ask whether the correct branch—Congress, the president, or the courts—is performing the function. If there is a mismatch between the branch and the activity, there is a violation.

Such an approach would surprise the Framers. For Madison, experience with the state governments under the Articles of Confederation had shown him that constitutional clauses that tried to separate powers—"parchment barriers," as he called them in *Federalist* No. 48—were ineffective in preventing dangerous agglomerations of power.¹⁴⁴ He therefore asks us to move beyond such definitional exercises: "After discriminating, therefore, *in theory*, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some *practical security* for each, against the invasion of the others."¹⁴⁵ What would provide that practical security? After dismissing several options, Madison finally comes to describe the foundation for the separation of powers in *Federalist* No. 51. In what makes for a surprise for many modern readers, he there focuses on parts of the constitutional framework that seem like mere technicalities: appointments, tenure in office, and salaries. As Professor Nourse has helped us recognize, those attributes of office, together with

¹⁴² U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id.* art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

¹⁴³ See Nourse, *supra* note 19 (explaining how over-emphasis on the Vesting Clauses leads to a function-matching approach to the separation of powers).

¹⁴⁴ THE FEDERALIST NO. 48, at 276 (James Madison) (Clinton Rossiter ed., 1961).

¹⁴⁵ *Id.* (emphasis added).

officeholders' electoral incentives, were at the heart of the Framers' understanding of the separation of powers.¹⁴⁶

What Madison's thinking should suggest to us is that the separation of powers is rooted in many parts of the Constitution, not solely, or even primarily, in the Vesting Clauses. One of the overlooked sources, I suggest, is the text providing that "[e]ach House may determine the Rules of its Proceedings."¹⁴⁷ Just as other scholars have shown the crucial role in the separation of powers played by seemingly prosaic bits of text such as the Incompatibility Clause,¹⁴⁸ the following pages provide an account of the foundational role played by the Rules of Proceedings Clause. The account should, I hope, be worthwhile in its own right inasmuch as it casts light on an underappreciated part of the constitutional design. In addition, the account will show why neither fast track nor any other statuted rule can be binding, and it will do so in a more satisfying fashion than can the anti-entrenchment norm.

Section A begins with the text of the Rules of Proceedings Clause and asks whether it directly forbids a fast track regime. Finding that inquiry inconclusive, the remainder of the Article then develops the clause's role in the separation of powers, beginning in Section B by drawing upon political science scholarship concerning agenda-setting. Section C then links the findings regarding agenda-setting to a constitutional principle that requires each branch to be sovereign over its own internal affairs. A binding fast track regime, I conclude, would violate that principle.

A. The Rules of Proceedings Clause Unadorned

Separation of powers analysis is always thorny. Faced with the seemingly irreconcilable approaches and outcomes that characterize the cases, respected commentators have found this branch of constitutional jurisprudence no less than appalling.¹⁴⁹ Our inquiry here at least has the advantage of being anchored by a concrete piece of text, and so it is worth considering whether fast track violates the Rules of Proceedings Clause more straightforwardly, without the

¹⁴⁶ See Nourse, *supra* note 19.

¹⁴⁷ U.S. CONST. art. I, § 5, cl. 2.

¹⁴⁸ See Calabresi & Larsen, *supra* note 20.

¹⁴⁹ See, e.g., E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506 (1989); DANIEL A. FARBER ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1025 (2d ed. 1998).

more amorphous separation of powers considerations that emanate from it. This type of clause-tethered approach did, after all, find favor with the Supreme Court in the line-item veto case, where the majority eschewed an explicit separation of powers analysis and instead decided the case on the “narrow,” more text-focused grounds of Article I, Section 7.¹⁵⁰

The Rules of Proceedings Clause simply declares that “[e]ach House may determine the Rules of its Proceedings.”¹⁵¹ Under a binding fast track regime, a chamber could change the relevant rules only by joining together with the other house, plus the president, and amending the statute. Under such a regime, a house would be unable to set its own rules. Such a system would directly conflict with the constitutional directive that each house may determine its own Rules. Thus, fast track violates the Constitution. Or so a simple textual argument might run.

The usual interpretive guides provide scant guidance on whether the syllogistic textual argument captures the proper import of the Rules of Proceedings Clause. The Framers certainly did not trouble over the rules power. During the 1787 convention, the Committee of Detail included the clause as part of Article VI, Section 6 of their draft, which provided that “[e]ach House may determine the rules of its proceedings; may punish its members for disorderly behaviour; and may expel a member.”¹⁵² When the full convention took up consideration of this section, Madison suggested that the text be amended to require a two-thirds vote for expulsion.¹⁵³ The amendment succeeded, and then the section as a whole was approved, apparently without further debate or controversy.¹⁵⁴

That the clause should strike the Framers as uncontroversial is, of course, not particularly surprising. A legislative assembly could hardly function without rules, and it seems only natural that the body itself should choose them. As Justice Story wrote:

No person can doubt the propriety of the provision
authorizing each house to determine the rules of its

¹⁵⁰ *Clinton v. City of New York*, 524 U.S. 417, 448-49 (1998).

¹⁵¹ U.S. CONST. art. I, § 5, cl. 2.

¹⁵² 2 RECORDS, *supra* note 136, at 180 (Aug. 6, 1787).

¹⁵³ 2 *id.* at 254 (Aug. 10, 1787).

¹⁵⁴ *See id.*

own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority.¹⁵⁵

Indeed, for some members of the Founding Generation, the legislature's power over its rules was merely a specific instance of a general right of self-government derived from natural law.¹⁵⁶

Nor has the Supreme Court had much occasion to confront the clause. The leading modern case on rules of proceedings is *Yellin v. United States*,¹⁵⁷ in which the Court reversed a contempt of Congress conviction on the grounds that the House Committee on Un-American Activities had failed to follow its own rules while questioning the petitioner. The other leading pronouncement, now over one hundred years old, gives the Rules of Proceedings Clause a broad but sensible reading, holding that each house may choose whatever rules it likes, provided only that its rules do not conflict with the Constitution or violate individuals' fundamental rights.¹⁵⁸ A few other appellate cases have dealt with rules of proceedings issues,¹⁵⁹ but none of the decisions give us insight into the substance of the rules power as it bears on the problem at hand—namely, whether the clause permits Congress to set internal rules by statute.

In interpreting the Rules of Proceedings Clause, we must recall the background norm that congressional action typically requires bicameral approval and presentment to the president. The Rules of Proceedings Clause, however, is one of several “carefully defined

¹⁵⁵ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 835 (1833).

¹⁵⁶ See 17 THE PAPERS OF THOMAS JEFFERSON 195 (J. Boyd ed. 1950).

¹⁵⁷ 374 U.S. 109 (1963).

¹⁵⁸ *United States v. Ballin*, 144 U.S. 1, 5-6 (1892).

¹⁵⁹ For a summary of the few cases that have interpreted the rules of proceedings power, see John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 530-41 (2001). Roberts's conclusion is that the cases “show both doctrinal confusion and an understandable reluctance to judge the internal rules of the House and Senate.” *Id.* at 530. See also *supra* note 102 and accompanying text (discussing the justiciability of disputes involving parliamentary rules).

exceptions” to this usual requirement.¹⁶⁰ In derogation from the norm of bicameralism and presentment, it provides that “[e]ach House may determine” its own rules. It thus empowers each house unilaterally to set its own procedures, which may well differ from those of the other chamber.¹⁶¹ At the same time, the clause does not on its face expressly *require* that rules may be set *only* in that manner. In this way the Rules of Proceedings Clause differs from some other exceptions to the bicameralism norm: The parts of the Constitution dealing with impeachment, for example, both provide for unicameral procedures outside of Article I, Section 7 *and* designate those procedures as exclusive.¹⁶² Should the Rules of Proceedings Clause—with its “may”—be read as the exclusive means of dealing with its subject? That is, does the grant of unilateral power implicitly forbid setting rules through the ordinary legislative process? If so, statuted rules are invalid *ab initio*.

The question whether each chamber’s internal rulemaking process provides the exclusive method for setting parliamentary rules is not unlike the controversy over whether the Constitution’s Treaty Clause provides the exclusive procedure for forming major international agreements.¹⁶³ In that debate, Professors Ackerman and Golove argue that the Treaty Clause, which does not by its own terms provide that it is the *only* method for approving international agreements, should not be understood as limiting Congress’s independent Article I legislative power to pass any law (including laws that approve international agreements) that is otherwise necessary and proper to carrying out Congress’s relevant enumerated powers, such as the powers of regulating commerce, declaring war,

¹⁶⁰ *INS v. Chadha*, 462 U.S. 919, 956 (1983).

¹⁶¹ An earlier draft of the Constitution was even more explicit on this point. One clause provided that “[t]he house shall have power to make rules for its own government,” and a separate clause accorded the same power to the Senate. RECORDS, *supra* note 136, at 140, 142.

¹⁶² U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the *sole power* of impeachment.”) (emphasis added); U.S. CONST. art. I, § 3, cl. 6 (“The Senate shall have the *sole power* to try all impeachments.”) (emphasis added). That these provisions are mandatory and set forth the exclusive means of effecting impeachment does not mean that the houses do not possess some discretion over how to carry out their constitutional duties. See *Nixon v. United States*, 506 U.S. 224 (1993) (holding nonjusticiable a claim that the Senate violated the Constitution by allowing a committee to hear evidence against an impeached official then report to the full Senate for a vote).

¹⁶³ See *supra* note 29 (describing the debate).

and raising armies.¹⁶⁴ The Treaty Clause is not an implicit bar to using the Article I power to pass otherwise valid legislation. To this Professor Tribe responds that the various portions of the Constitution must be read together, and that structural considerations dictate that the Treaty Clause is meant to describe the uniquely proper method for concluding major international agreements, despite the clause's lack of the word "only."¹⁶⁵

On its face, the Rules of Proceedings Clause takes the form of a permission to deviate from the usual legislative procedure of bicameralism and presentment: "[e]ach House *may*." According to an Ackerman/Golove-inspired approach to the clause, the permission would not be a requirement. Fast track would be constitutional as long as it was otherwise authorized, and it would be so authorized because it effectuates Congress's power to set tariffs and regulate foreign commerce.¹⁶⁶

The non-exclusive reading of the Rules of Proceedings Clause finds some support in the Supreme Court's reading of a related constitutional provision. The Constitution gives "each House" the power to discipline its members; this grant of power, in fact, is part of the same sentence as the rules power: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."¹⁶⁷ In *Burton v. United States*,¹⁶⁸ the Court ruled that this clause does not mean that Congress cannot regulate its members'

¹⁶⁴ Ackerman & Golove, *supra* note 29, at 811, 913-14, 919-20; see also David M. Golove, *Against Free-Form Formalism*, 73 NYU L. REV. 1791 (1998) (further defending the non-exclusive reading of the Treaty Clause).

¹⁶⁵ Tribe, *supra* note 29, at 1240-45.

¹⁶⁶ U.S. CONST. art. I, § 8, cls. 1 (tariffs), 3 (foreign commerce). Needless to say, the "necessary and proper" requirement, U.S. CONST. art. I, § 8, cl. 18, has long been interpreted to mean something more like "useful." See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 324-25 (1819). Whatever else might be said about it, fast track is certainly a "useful" way of dealing with tariffs and trade. Thus, we need not ask whether fast track is "necessary and proper" to carrying out the Rules of Proceedings power itself. One could argue that no *statute* can properly carry out that power, inasmuch as it is a power of "[e]ach House." See Vermeule, *supra* note 108, at 52. Congress takes a different view, since it explicitly grounds statutized rules in the rules power; the typical disclaimer clause provides that the measure is "enacted . . . as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively." But even if Congress is incorrect in believing that the Rules of Proceedings Clause can authorize statutes, the substantive power to regulate commerce still provides a basis for the enactment.

¹⁶⁷ U.S. CONST. art. I, § 5, cl. 2.

¹⁶⁸ 202 U.S. 344, 365-68 (1906).

behavior (in this case, a senator's) through criminal statutes as well. At issue was a statute making it a crime for government officers (including senators) to receive payment for representing an individual before a government agency. In finding that the statute did not impermissibly interfere with the Senate's constitutional powers over its members, the Court wrote:

[The Framers] never contemplated that the authority of the Senate to admit to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it.¹⁶⁹

In the Court's view, each chamber's unilateral power to police its membership is not a limit on the legislative power. If the Rules of Proceedings Clause—the textual neighbor of the clause at issue in *Burton*—were interpreted analogously, it would not bar a statute that set internal rules. The crucial caveat, of course, is that the use of the legislative process to handle internal rules must not be otherwise forbidden by the Constitution. Even if the text of the Rules of Proceedings Clause is itself non-exclusive, statutized rules could still be impermissible for other reasons, such as that they violate the separation of powers—a point to which we will soon return.

If one were to adopt a Tribe-influenced view, the existence of the Rules of Proceedings Clause would tend to cast suspicion on using the statutory form to prescribe internal procedures. But even on this view, making the case against statutized rules would still require one to produce an explanation for why allowing rules to be set by statute would upset the constitutional design. There would need to be something uniquely appropriate, from the point of view of constitutional structure, about the particular method of setting rules contemplated by the Rules of Proceedings Clause. With respect to the Treaty Clause, one would try to make the case for exclusivity by arguing that supermajority assent and a special role for the Senate (with its long-term perspective and equal representation of the

¹⁶⁹ *Id.* at 367.

states) are uniquely appropriate procedures when considering an agreement that would fundamentally and durably reconfigure our relationships with foreign actors; if one understood the significance of the action at stake, the argument would go, one would see why the special method of the Treaty Clause bars use of the normal legislative process. An argument for the exclusivity of the Rules of Proceedings Clause would have to proceed along analogous lines, pointing to structural considerations that make it uniquely proper to set parliamentary rules only through each chamber's internal processes.

As things currently stand, without having yet developed the separation of powers considerations that inform the Rules of Proceedings Clause, it remains unclear whether the clause implicitly forbids statutized rules. Before moving on, however, it is worth pondering a second question about how to read the clause; namely, Even if the clause does not forbid Congress from setting an internal rule through the ordinary statutory process, does the clause nonetheless give each house the power to abrogate any such statute through subsequent unilateral action? This is basically the question whether the Rules of Proceedings Clause commands the result described by the disclaimer language that Congress typically inserts in fast track-type laws,¹⁷⁰ which language provides that statutory rules of procedure are enacted with the "full recognition of the constitutional right of either House to change the rules (so far as relating to the procedures of that House) at any time, in the same manner, and to the same extent as any other rule of that House." On this view of the matter, the Rules of Proceedings Clause should be read to provide that each house may *at every moment* determine the rules of its proceedings, *despite any statutory enactments to the contrary*. A statutized rule would be just like any other rule of the House or Senate, regardless of its Article I, Section 7 pedigree and its placement in the United States Code.

Yet one can hardly state such a proposition without being struck by its strangeness. It seems natural to think of a valid statute as possessing greater dignity than an internal rule, just as an applicable constitutional provision possesses greater dignity than a statute. If a statute and a rule—both otherwise valid—render conflicting directions regarding some issue, then should not the statute

¹⁷⁰ See *supra* Section I.B.2.

control?¹⁷¹ And even Congress takes exactly this view regarding statutes passed earlier in the same session, holding that they are binding in matters of procedure.¹⁷² If rules could routinely abrogate statutes, it would seem that Congress could be, in a meaningful sense, lawless.

The common sense suspicion of unilateral abrogation is buttressed by the Supreme Court's holding in *INS v. Chadha*. *Chadha* emphasizes that "[a]mendment and repeal of statutes, no less than enactment" must follow the norms of bicameralism and presentment.¹⁷³ The *Chadha* Court found it significant that the one-house veto at issue in that case was a substitute for—would "supplant"—action by way of ordinary legislation.¹⁷⁴ But how can we describe the unilateral decision to change a statuted rule as anything other than the amendment or repeal of a statute outside of the constraints of bicameralism and presentment?

The obvious response to the *Chadha* charge is that a resolution changing the rules under which a trade bill is considered is not activity subject to the requirements of bicameralism and presentment. Indeed, *Chadha* itself recognizes that there are textual exceptions to the normal requirement that Congress act only via bicameralism and presentment; the Court's list of exceptions includes impeachment, treaty approval, and, critically, each chamber's power to regulate its own internal affairs.¹⁷⁵ This suggests that *Chadha* is not even implicated by unilateral abrogation of fast track rules.

The argument that exercise of the rules power provides an exception to the usual lawmaking procedure is certainly correct as far as it goes, but it does not really get at the difficulty here. For here Congress has *not* simply acted through the rules process; it has instead passed a statute that includes rules of debate. And if Congress has *enacted rules into law via a duly passed, valid statute*, then

¹⁷¹ The question of the relative weight of rules and statutes arose in a D.C. Circuit case concerning the voting rights of territorial delegates to the House of Representatives. See *Michel v. Anderson*, 14 F.3d 623, 628 (D.C. Cir. 1994) (stating that if the statute creating the delegate positions barred them from voting in the Committee of the Whole, "then that condition would trump any authority of the House to change its rules unilaterally to grant that power").

¹⁷² See *supra* note 89 and accompanying text.

¹⁷³ 462 U.S. 919, 954 (1983).

¹⁷⁴ *Id.* at 952-54.

¹⁷⁵ *Id.* at 955-956, 956 n.20.

don't we still have to face the fact that "[a]mendment and repeal of statutes, no less than enactment" must comply with Article I, Section 7? In other words, statutes can be changed only through the statutory process, even if they deal with subjects that might have been handled otherwise.¹⁷⁶

One response to that last proposition would be that it is not the *form* of a directive that makes the requirements of bicameralism and presentment apply, but instead its content. The suggestion, in other words, would be that the legislature's actions could alter provisions of a statute and yet not be "legislative" in character, and thus not subject to Article I, Section 7.¹⁷⁷ In trying to define what makes an act "legislative in character," the *Chadha* Court said that the one-house vote to deport Mr. Chadha was legislative because it was "action that had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, executive branch officials and Chadha, all outside the legislative branch."¹⁷⁸ But if that is the test, then rescinding a fast track system likely counts as "legislative" activity too. In the trade context, killing fast track has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch" in that it strips the president of the right to implement a trade pact through the expedited process set forth in the statute. (And, practically speaking, stripping away that prerogative probably torpedoes the chances of reaching any trade agreement, at least if one believes what both foreign and domestic officials say about fast track's importance.¹⁷⁹) That changing a statutized rule is a "legislative" act is even more clear with respect to those fast track statutes in which persons outside government are more directly affected, as is true of the fast track regime governing special appropriations to cover excess liabilities related to commercial space launch disasters.¹⁸⁰

¹⁷⁶ It is, of course, no answer to say that the fast track statute itself licenses subsequent unilateral action. The same was true of the statute in *Chadha*.

¹⁷⁷ Professor Koh, for instance, has argued that fast track disapproval resolutions are for this reason constitutional. Koh, *supra* note 23, at 1216-17, 1217 n.77 (1986). See also Paul R. Q. Wolfson, Note, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838, 852-55 (1987) (arguing that a statute setting forth legislative procedures is not a "legislative" act).

¹⁷⁸ *Chadha*, 462 U.S. at 952.

¹⁷⁹ See *supra* notes 63-66 and accompanying text.

¹⁸⁰ 49 U.S.C.A. § 70101 et seq. (West 1999 & Supp. 2003).

If the foregoing line of argument is sound, then much of the previous thinking about the constitutional status of statutized rules is incorrect. Not only does the Constitution not require the result described in the disclaimer clauses that Congress usually inserts into the statutes, but in fact the *Chadha* decision might forbid unilateral abrogation of rules set in statutory form. Yet, all the same, most people probably have a strong conviction that each chamber should have the power to change its own rules regardless of any statute to the contrary, whether or not doing so makes Congress in a sense "lawless." As happened in the discussion of entrenchment, then, the analysis of fast track's constitutional status has left us with more puzzles than answers. The answer to these puzzles, I suggest, can be found by examining the Rules of Proceedings Clause within its proper structural context, a task to which I now turn.

B. The Structural Context of the Rules of Proceedings Clause

The Rules of Proceedings Clause does not, all by itself, tell us whether statutes may properly substitute for internal rules of debate. To capture the import of the clause, we must see not just what it says, but what it does. To that end, this section will draw upon political science scholarship and positive political theory in particular, to demonstrate the immense practical importance of control over legislative rules. A binding fast track regime would have a huge impact on legislative outcomes. More importantly, it would accomplish its aim in a way that violates a foundational principle of separation of powers.

1. Rules of Proceedings and Agenda Control

It is axiomatic that the core function of the legislature is to legislate. But a legislature could hardly legislate without procedural rules. Indeed, it is hard to imagine what a legislature without rules would look like. Who would talk and for how long? What subjects could be discussed? When would a vote take place? Who gets to tally the votes?¹⁸¹ The thought of a legislature without rules probably evokes visions of everyone talking at once, but in truth a rule-less

¹⁸¹ In the House of Representatives, where rules do not carry over from one session to the next, these questions are initially answered by the general parliamentary law reflected in Jefferson's *Manual*, which governs until the new session adopts its own standing rules. HOUSE MANUAL, *supra* note 9, § 60.

assembly would be worse than that, for even the disorganized legislative mob that we are trying to imagine apparently has rules that tell it where and when to convene. A legislature could do without the formal books of rules and precedents we are familiar with, but it could hardly conduct business without ordering mechanisms of *some* sort.

At some level, the choice of rules is merely arbitrary, as in many cases no particular way of doing things is intrinsically more meritorious than another. Thomas Jefferson, who was among many other things one of our first great parliamentarians, wrote that it was “really not of so great importance” whether the rules selected were the most rational ones. “It is much more material,” he believed, “that there be a rule to go by than what that rule is.”¹⁸² It would be a grave error, however, to believe that the choice of rules is unimportant.¹⁸³ On the contrary, as explained below, rules of proceedings determine outcomes.

Power over the rules is so important precisely because the Constitution has so little to say about legislative procedure. As a matter of constitutional text, legislating consists of bicameral passage followed by presentment to the president. But as a matter of practical reality, that tells us almost nothing about which statutes will be enacted. To begin with, legislators will disagree about which perceived problems require legislative action. Even when a problem is widely recognized as requiring some response, there may be a multitude of possible solutions. It will frequently be the case that any of several bills aimed at a particular problem could potentially win the support of a majority. Which problems, and which solutions, will receive the Article I, Section 7 treatment?

Merely to pose that question is to highlight the overriding importance of *agendc. control*—that is, control over the sequence and rules under which the legislature considers proposals. Social scientists employing formal models of voting have produced powerful conclusions that emphasize the profound impact of seemingly trivial matters such as the order in which alternatives are considered. One of the simplest ways to demonstrate this

¹⁸² *Id.* § 285.

¹⁸³ See, e.g., Miller, *supra* note 102, at 1365 (incorrectly asserting that “[i]f a bill is destined to pass, it will pass under any system of rules in effect.”).

phenomenon is through the Condorcet voting paradox.¹⁸⁴ Suppose, for example, that a majority of the legislature would prefer Option A over Option B, Option B over Option C, and Option C over Option A.¹⁸⁵ Under such circumstances, the legislators' preferences do not yield a uniquely preferred outcome. Option A will win if it faces the winner of a vote between B and C, for instance, but Option C will prevail if the body first chooses between A and B. Indeed, any of the outcomes can prevail, given an appropriate manipulation of the sequence. The outcome therefore depends not upon preferences but upon control over the agenda.¹⁸⁶

The voting dynamics just described are not mere hypothetical possibilities, artifacts of peculiar assumptions about preferences. On the contrary, the results generalize quite broadly,¹⁸⁷ broadly enough that leading scholars in the field have come to regard such patterns as "omnipresent in the environment of legislatures."¹⁸⁸ And, indeed, one can point to a number of real-world cases that exemplify the Condorcet paradox.¹⁸⁹

¹⁸⁴ For an introduction to the voting paradox, see KENNETH A. SHEPSLE & MARK S. BONCHER, *ANALYZING POLITICS* 49-81 (1997). The credit for resurrecting Condorcet's work, and for recognizing its theoretical importance, belongs largely to DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958).

¹⁸⁵ In formal terms, such a preference ordering is referred to as intransitive. Although it is controversial whether a rational individual can possess preferences of this sort, see JED RUBENFELD, *FREEDOM AND TIME* 103-12 (2001), it is in no way mysterious how a legislature could display them. Suppose that Congress is debating tax reform. The options are maintaining the current income tax rates, cutting tax rates on the wealthy, or replacing the current system with a consumption tax. Suppose further that the legislature consists of three roughly equally numerous groups: 1) partisans of the status quo, who rank the alternatives [current system, lower rates, consumption tax]; 2) rate-cutters, who rank them [lower rates, consumption tax, current system]; and, 3) fairness-minded reformers, who rank them [consumption tax, current system, lower rates]. If faced with pairwise choices, this Congress would prefer the current system over lower rates for the wealthy, lower rates for the wealthy over a consumption tax, and a consumption tax over the current system—an intransitive result. There is good reason to believe that Congress in fact possessed analogously intransitive preferences during the debate over the Revenue Act of 1932. See John C. Blydenburgh, *The Closed Rule and the Paradox of Voting*, 33 J. POL. 57, 62-67 (1971).

¹⁸⁶ This insight has been widely recognized. See, e.g., Richard D. McKelvey, *Intransitivities in Multi-Dimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472, 480-81 (1976); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 385 (1988).

¹⁸⁷ See, e.g., McKelvey, *supra* note 186, at 472, 480; Norman Schofield, *Generic Instability of Majority Rule*, 50 REV. ECON. STUD. 695 (1983).

¹⁸⁸ Riker & Weingast, *supra* note 186, at 384.

¹⁸⁹ See, e.g., WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* 10-17, 34-51, 106-28 (1986); William H. Riker, *Arrow's Theorem and Some Examples of the Paradox of Voting*, in

The reason why one does not observe indeterminate voting cycles more frequently is because of the existence of institutions that carefully control the legislative agenda. For while the legislature is at bottom a collection of preference-bearing individuals—and as such is subject to the pathologies described above—its simple foundation is adorned with a variety of decision-shaping structures and procedures. The committees and their chairmen are perhaps chief among these, and a large literature has highlighted their role as agenda-setters.¹⁹⁰ Likewise, the whole foundation of the considerable institutional power of the House Rules Committee derives from its ability to control the sequence and circumstances of debate—that is, to manipulate the agenda.¹⁹¹

Since the legislature's internal structures and procedures determine the outcome of otherwise indeterminate preference patterns, congressional decisionmaking thus provides an example of *structure-induced equilibrium*.¹⁹² And recall that very few of these crucial equilibrium-inducing structures are constitutionalized—the requirement of bicameral passage of identical text and the requirement that revenue bills originate in the House of Representatives being the most prominent exceptions.¹⁹³ Apart from these minimal directives, the remainder is for Congress to decide through its Rules of Proceedings power.

MATHEMATICAL APPLICATIONS IN POLITICAL SCIENCE 41 (John M. Claunch ed., 1965); Blydenburgh, *supra* note 185, at 62-67.

¹⁹⁰ See, e.g., RICHARD F. FENNO, CONGRESSMEN IN COMMITTEES (1973).

¹⁹¹ Other institutions, such as political parties and their leadership structures, play similarly critical roles in stabilizing legislative outcomes. See, e.g., Gary W. Cox & Matthew D. McCubbins, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE (1993); Gary W. Cox & Matthew D. McCubbins, *Bonding, Structure, and the Stability of Political Parties: Party Government in the House*, in POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS 101 (Kenneth A. Shepsle & Barry Weingast eds., 1995); John H. Aldrich, *A Model of a Legislature with Two Parties and a Committee System*, in *id.* at 173.

¹⁹² The leading early contributions to the theory of structure-induced equilibrium in legislatures include Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979); and Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503 (1981). A large body of scholarship has built upon those contributions; see, e.g., POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS, *supra* note 191; and Douglas Dion, *The Robustness of Structure-Induced Equilibrium*, 36 AM. J. POL. SCI. 462 (1992). For a recent review of the literature on the effects of parliamentary rules, see Gary W. Cox, *On the Effects of Legislative Rules*, in LEGISLATURES: COMPARATIVE PERSPECTIVES ON REPRESENTATIVE ASSEMBLIES 247 (Gerhard Loewenberg ed., 2002).

¹⁹³ Even with respect to the latter, the constitutional requirement has little practical bite. See *United States v. Munoz-Flores*, 495 U.S. 385, 397-401 (1990).

With these considerations in mind, we can see the Rules of Proceedings Clause in a new light. Far from being a small bit of housekeeping, it assumes a role near the center of the legislative function. The Rules of Proceedings Clause is bicameralism and presentment at work, legislation as it plays out on the ground, lawmaking getting its hands dirty. Legislators realize that voting rules and other procedural details determine outcomes, and that is why they wrangle over such matters so fiercely, much to the befuddlement of outsiders.¹⁹⁴

How does fast track fit into this picture? What binding statutized rules would do, among other things, is erode each chamber's power to set its own agenda. The president's agenda becomes the Congress's agenda. This switch in control manifests itself in a number of ways, including the timing and content of legislative action.

a. Timing

Under fast track rules, the president's implementation bill "shall be introduced" and referred to the appropriate committee on the day the president sends the bill to Congress.¹⁹⁵ If the committee does not report the bill within forty-five days, it is "automatically" discharged and placed on the chamber's calendar.¹⁹⁶ The whole house must then vote on the bill within fifteen days.¹⁹⁷ Thus, the president can always count on his trade agreement being voted upon within sixty days of sending it to Congress.

While this might not seem like a serious imposition, to view it as a "mere" matter of scheduling is to miscomprehend the workings of the legislature. As an institution, Congress can consider only a limited number of significant proposals in any given session. Oftentimes crucial bills will languish for months, finally passing only in a final flurry of deal-making and voting that precedes adjournment. In part this reality is a result of the difficult and time-consuming nature of legislating in the modern Congress.¹⁹⁸ But much is the result of carefully orchestrated political maneuvering

¹⁹⁴ William H. Riker, *Comment on Baker*, 67 CHI.-KENT L. REV. 791, 791 (1991).

¹⁹⁵ 19 U.S.C.A. § 2191(c) (West Supp. 2003).

¹⁹⁶ *Id.* § 2191(e).

¹⁹⁷ *Id.*

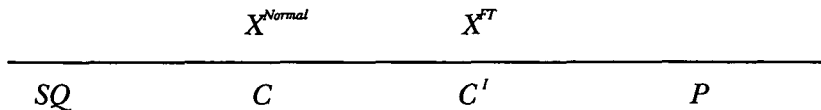
¹⁹⁸ *See supra* Section I.A (describing the legislative process and vetogates).

between the majority and the minority, the leadership and backbenchers, or the White House and Congress. As all of these political actors recognize, the “mere” timing of a vote can mean nearly everything.

The power that fast track would grant the president comes into greater focus if one considers the political dimensions of a trade vote. The vote on a significant trade agreement will likely draw considerable media coverage, not to mention the keen interest of both unions and business groups. Legislators pay intense attention to the scheduling of such salient votes, especially when elections are looming. In the run-up to the 2002 midterm election, for example, some Democrats had hoped to postpone a vote on authorizing force against Iraq until after the election. The Bush Administration, on the other hand, wanted to force a vote before the election, knowing that politically vulnerable doves would feel constrained to give the president a vote of confidence.¹⁹⁹ As it happened, the vote did occur before the election, but not because President Bush had any legal means of forcing a vote. With fast track’s guaranteed speedy consideration, in contrast, the president could compel Congress to take a stand on politically sensitive issues when he chooses, not when a majority of legislators do. He could time the vote to maximize the chances of passage, or indeed to advance any aim he likes.

b. Content

A binding fast track regime would drastically alter the two branches’ relative control over the content of legislation. The following diagram provides an illustration of the effect.²⁰⁰



Point SQ represents the position of the current status quo policy. In the trade context, it could represent the relatively high level of tariffs and related protections that characterize our relations with

¹⁹⁹ Julie Mason & Cynthia Lee, *Bush to U.N.: Act Now on Iraq; Push for War Vote May Be Casualty of Politics on Hill*, HOUSTON CHRON., Sept. 13, 2002, at A1.

²⁰⁰ As the reader may recognize, this form of modeling is similar to that found in KEITH KREHBIEL, PIVOTAL POLITICS 3-48 (1998); and William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

countries with whom we have not signed a free trade agreement. (This model of the legislative process could of course describe any policy area, not just trade.) Let us assume that if Congress were the only policymaker, it would set its ideal policy at C .²⁰¹ That is, Congress would prefer that trade be somewhat freer than under the status quo. Finally, let us suppose (not at all implausibly) that the president would most prefer a policy set at P , which is significantly less protectionist than either the status quo or C .²⁰² Under Article I, Section 7, Congress generally has a first-mover advantage. Therefore, given the preferences shown above, Congress could pass a bill at C , and the president would sign it because he prefers C to the status quo.²⁰³ We can therefore expect a policy of X^{Normal} . We can think of this result as the constitutional baseline.

It might at first seem that this baseline could not describe the trade context, since Congress cannot implement a congressional-executive agreement unless the administration first negotiates it. And without the usual first-mover advantage, it would seem to follow that Congress could not set trade policy at its preferred point, C . It would appear, therefore, that in the trade context the administration could set policy as far to the right as C' , the point at which Congress would be indifferent between retaining the status quo and adopting the administration's proposal. Yet this impression is misleading, for even if the president negotiated an agreement barely palatable to Congress—such as one that set policy at C' —under the usual rules of legislative procedure Congress could still move policy back toward C . Congress could do this in two ways. First, it may be that the same agreement could be implemented in domestic law in more than one way. For instance, where the pact leaves U.S. obligations ambiguous, Congress could take a more protectionist approach to implementation than the president would prefer.²⁰⁴ Much more importantly, however, even without tinkering with U.S. obligations

²⁰¹ Because of bicameralism, vetogates, the Senate filibuster, etc., C does not simply represent the preferences of the median legislator.

²⁰² The president's preferences are not an accident. The president represents a national constituency and is thus predictably less disposed to protectionist measures.

²⁰³ Eskridge & Ferejohn, *supra* note 200.

²⁰⁴ Uncertainties often arise regarding the extent to which domestic law must be changed to conform with an international agreement. In the domain of copyright, for instance, there was a long-running debate over whether the Berne Convention Implementation Act sufficed to bring U.S. law into compliance with the Convention. See 3 NIMMER ON COPYRIGHT § 8D.02 (2003).

under the trade agreement, Congress could normally amend the implementing bill with add-on measures that, on balance, move overall policy to C . In 2000, for instance, Congress was able to agree to a bill implementing China's accession to the WTO by tacking on provisions creating a human rights watchdog commission.²⁰⁵ Thus, under normal legislative procedures, Congress could take a presidential implementation bill located at C' and turn it into an implementation bill located at C . The president would sign this amended bill because he prefers it to the status quo. Under the usual rules of debate, therefore, trade policy will be set at X^{Normal} , which matches the usual result under Article I, Section 7.

The situation is quite different under fast track. Because the president can force a quick vote, and because amendments are barred, the president can present Congress with a take-it-or-leave-it proposition. In the diagram above, Congress will take any measure set at or to the left of C' . Therefore, under a binding fast track regime, we can expect policy to be set at X^{FT} .

To be sure, the model presented above is quite simplified and ignores certain dynamics of the inter-branch bargaining process. All the same, the basic insight it illustrates meshes quite comfortably with results in the political science literature. Scholars who have studied the strategic effect of amendment rules have shown that a system of closed rules (that is, rules barring amendment) systematically advantages the person proposing a measure, allowing the proposal-maker to set policy closer to his preferred outcome than he could under a system of open rules.²⁰⁶ The divergence between X^{Normal} and X^{FT} reflects the fact that fast track is a regime of closed rules with the president as proposal-maker. Likewise, research on referenda—which, like fast track, present the voters with unamendable, take-it-or-leave-it choices—has demonstrated that the party who has the procedural power to make the proposal enjoys a tremendous advantage over those who vote on it. In particular, the more the majority dislikes the fall-back point (that is, SQ in this case),

²⁰⁵ Tiefer, *supra* note 10, at 470-71.

²⁰⁶ See David P. Baron, *A Sequential Choice Theory Perspective on Legislative Organization*, in *POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS*, *supra* note 191, at 71, 84-85; David P. Baron & John A. Ferejohn, *Bargaining in Legislatures*, 83 *AM. POL. SCI. REV.* 1181, 1188, 1197-98, 1200 (1989).

the greater the agenda-setter's power to shift policy toward her own preferences.²⁰⁷

The move from X^{Normal} to X^{FT} is a major shift in terms of policy outcomes, but it is more than just that. It is a reversal of the relative policy-setting power of the president and the legislature. The president's political power under fast track is analogous to the economic power of a monopolist. A monopolist sets prices at the level that maximizes profits, and consumers in such a market must act as price-takers. In the same way, fast track makes the president a proposal-maker who, by setting policy at C' , can appropriate to himself all of the benefits from changing the status quo. It is a qualitative reversal of roles, not just a (hard to measure) quantitative difference between X^{Normal} and X^{FT} .

Presidential monopoly power is not the Constitution's vision of the relationship between president and Congress. Under Article I, Section 7, it is the legislature that occupies the dominant role in the legislative process, possessing both the first move and, in the case of a veto, the last move in the game. Deviating from this usual arrangement, the Constitution grants the president the power to make take-it-or-leave-it proposals in only the most limited circumstances. Notably, the president can appoint executive officers and judges with the advice and consent of the Senate.²⁰⁸ The president's appointments therefore need only be minimally palatable to Congress.²⁰⁹ The power of appointment is thus an area in which the president does (and arguably should) have a greater say than Congress. But this arrangement is not the usual rule, so far as the Constitution sees it.

As a way of resisting the conclusion that fast track marks a significant departure from the Constitution's usual vision of lawmaking, one might argue that trade agreements should be an exception to the background norm of legislative price-setting. For what are we to make of the fact that the Constitution provides that

²⁰⁷ See Thomas Romer & Howard Rosenthal, *Bureaucrats Versus Voters: On the Political Economy of Resource Allocation by Direct Democracy*, 93 Q.J. ECON. 563, 564 (1979); Thomas Romer & Howard Rosenthal, *Political Resource Allocation, Controlled Agendas, and the Status Quo*, 33 PUB. CHOICE 27, 27-28, 35-36 (1978).

²⁰⁸ U.S. CONST. art. II, § 2, cl. 2.

²⁰⁹ Baron and Ferejohn note that the presidential appointment power is an example of the "power to propose" and predict that the president should receive "asymmetric payoffs" vis-à-vis the legislature. David P. Baron & John Ferejohn, *The Power to Propose*, in *MODELS OF STRATEGIC CHOICE IN POLITICS* 343, 366 (Peter C. Ordeshook ed., 1989).

“[the president] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”²¹⁰ Like the president’s appointment power, this clause also contemplates the president as proposer. If implementation of presidentially negotiated trade pacts as ordinary legislation has over time come to substitute for the ratification of treaties,²¹¹ then fast track would perhaps not really be upsetting the usual constitutional balance. If anything, it would be restoring a result closer to what the Treaty Clause envisions. Fast track would be a second-best constitutional settlement, given the obsolescence of the formal treaty route. We could call this the equilibrium-restoration defense of fast track.

While promising, the foregoing defense is too quick in assuming that the Treaty Clause is the proper baseline for comparison. On the one hand, as emphasized above,²¹² fast track regimes exist throughout the U.S. Code, not just in the trade policy context that is the focus of this paper. The Treaty Clause is not the relevant constitutional baseline against which to assess, to choose one example, the fast track regime that allows the Secretary of Energy to submit bills to implement contracts to purchase oil for the strategic reserves.²¹³

On the other hand, even within the realm of international trade, it is doubtful that many of the agreements subject to fast track should be considered “treaties” within the meaning of the Treaty Clause. To be sure, the distinguishing feature of “treaties” is contested, with some scholars positing a subject-matter test²¹⁴ and others holding

²¹⁰ U.S. CONST. art. II, § 2, cl. 2.

²¹¹ See Ackerman & Golove, *supra* note 29 (tracing the decline of the formal treaty); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987) (“The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.”). *But see* Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, 993-1009 (2001) (questioning whether treaties and congressional-executive agreements have in practice become interchangeable instruments).

²¹² *Supra* note 9 and accompanying text.

²¹³ See Energy Policy and Conservation Act Amendments of 1990 § 6(a)(4), 42 U.S.C. 6249c (2000).

²¹⁴ See John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001). Yoo writes:

[T]he normal statutory mode must be used to approve international agreements that regulate matters within Congress’s Article I powers. The

that the determinative factor is the degree of sovereignty at stake.²¹⁵ On the subject-matter test, the Constitution's grant of power over foreign commerce to Congress would imply that trade agreements are properly handled via implementing legislation, not the treaty process.²¹⁶ Nor would the vast bulk of trade agreements count as treaties on the degree-of-sovereignty test. Even if an arrangement as far-reaching as the WTO Agreement should arguably be done as a treaty, an agreement lowering trade barriers to Chilean agricultural products almost certainly would not rise to the same level.²¹⁷ So the better baseline for measuring fast track is Article I, Section 7, not the Treaty Clause.

Finally, even if the Treaty Clause were the proper baseline, the equilibrium-restoration defense of fast track misunderstands the nature of that baseline. That defense, recall, posited that fast track simply returns the constitutional center of gravity to the executive branch, where it purportedly resides under the Treaty Clause. But the Treaty Clause requires the assent of *two-thirds* of the Senate, putting the president at the mercy of a potentially parochial minority.²¹⁸ Moreover, as against fast track's bar on amendments, the

device of the congressional-executive agreement ensures that the same public lawmaking process will apply to the same subjects, regardless of whether an international agreement is involved or not. This approach leaves ample room for treaties, which still must be used if the nation seeks to make agreements outside of Congress's competence or bind itself in areas where both President and Congress exercise competing, overlapping powers.

Id. at 764.

²¹⁵ See Tribe, *supra* note 29, at 1268 (stating that "one must consider the degree to which an agreement constrains federal or state sovereignty and submits United States citizens or political entities to the authority of bodies wholly or partially separate from the ordinary arms of federal or state government").

²¹⁶ Yoo, *supra* note 214, at 822-25.

²¹⁷ Compare Tribe, *supra* note 29, at 1267 n.156 (asserting that the WTO Agreement burdens national and state sovereignty enough to demand approval as a treaty) *with id.* at 1277 n.195 (conceding that "[a]n analysis of [NAFTA and bilateral trade agreements] might suggest that much of what they accomplish—such as the setting of tariff rates—would not so affect state or national sovereignty as to require Treaty Clause procedures").

²¹⁸ Indeed, the vulnerability of the treaty process to the objections of a recalcitrant minority of Senators is a leading reason that congressional-executive agreements became preferred. See Ackerman & Golove, *supra* note 29, at 861-66; see also Spiro, *supra* note 211, at 1004 (noting that "[h]istorical experience—and indeed the origins of the congressional-executive agreement—would seem to indicate that the Senate route presents the higher hurdle [than a majority of both Houses]." (citation omitted)). NAFTA garnered majorities in both chambers, but it did not receive a two-thirds supermajority in the Senate. See 139 Cong. Rec.

Senate, with relative frequency, adds reservations and declarations to its assent to treaties.²¹⁹ Thus, compared to fast track, the treaty process is not especially favorable to the president, and it would likely produce an equilibrium significantly to the left of X^{FT} . Fast track is more favorable to the president than either the Treaty Clause or Article I.

* * *

I have argued that a binding fast track regime would work a systematic shift in policymaking power between the executive and legislative branches, a shift that reverses the Constitution's usual path. The response to this structural argument would be that the statutorily created rules of procedure that accomplish this shift of power do not purport to be irreversible: Even if statutized rules stripped each chamber of its unilateral power to determine its rules, the statutized rules could still be changed by amending the law that created them. The possibility of changing the procedures to reestablish the constitutional status quo does not suffice to eliminate the structural problem, however. The reason is not merely that the statutory route is difficult, for legislating is always difficult, especially when the veto-wielding president is hostile to the change. Instead, the trouble is that the statutory route gives the president a say over the rules at all. The president's participation in this matter offends a very old principle of the separation of powers, as explained next.

2. *Master in One's Own House*

In one category of separation of powers case, the problem is that one branch of government is arguably carrying out a function entrusted to another branch. Thus, in the celebrated Steel Seizure case, the majority thought that the crucial question was the nature of the activity of seizing the steel mills. If it was an exercise of the legislative power, then it was forbidden to the president, for only Congress can properly exercise that power.²²⁰ Likewise, in *Bowsher v. Synar*, the crucial step was the determination that the Comptroller

S16, 712-13 (daily ed. Nov. 20, 1993). Ackerman and Golove argue that obtaining the additional votes in the Senate would have been "a formidable task." Ackerman & Golove, *supra* note 29, at 927 n.5.

²¹⁹ See Kevin C. Kennedy, *Conditional Approval of Treaties by the U.S. Senate*, 19 LOY. L.A. INT'L & COMP. L. REV. 89, 91 (1996) (estimating that approximately 15% of treaties have been approved subject to such conditions).

²²⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952).

General's activities under Gramm-Rudman-Hollings were executive in nature; and since they were executive, they could not be performed by an agent under Congress's control.²²¹ Q.E.D.

Whatever else might be said about fast track, it cannot really be said that it lets one branch perform a function vested in a coordinate branch. Congress is still legislating, after all, and the president is still signing laws and executing them. But, all the same, Congress and the president are working together *very differently* when they operate under fast track rules. The statutized rule says that Congress cannot amend the president's bill, cannot schedule the bill as it pleases, cannot filibuster, and so on. Changing a binding statutized rule would require action by both chambers and, unless two-thirds of each chamber agrees, help from the president himself (who is, of course, most unlikely to grant it). As the previous section demonstrated, these changes have profound effects on legislative outcomes.

The policymaking influence that the president gains at the legislature's expense under binding statutized rules suggests that fast track might implicate a second general family of separation of powers violations—those which occur when a branch is unduly burdened in carrying out its constitutional duties. Admittedly, the doctrine in this area is not wholly clear, and when cases of this sort reach the courts, the outcomes tend to be unpredictable. In *Nixon v. Fitzgerald*, the Supreme Court balanced competing values and found that permitting a civil damage suit arising out of the president's official acts would impermissibly "intru[de] on the authority and functions of the Executive Branch."²²² But in *Morrison v. Olson*, in stark contrast, the Court found that the creation of an "independent counsel" to investigate high-ranking executive officials did not "unduly interfer[e] with the role of the Executive Branch."²²³

How would one go about demonstrating that fast track is a violation of this sort? One could start by saying that the dislocations

²²¹ 478 U.S. 714, 732-34 (1986).

²²² 457 U.S. 731, 754 (1982). In his concurring opinion, Chief Justice Burger expanded upon the separation of powers rationale for the president's immunity. *See id.* at 758.

²²³ 487 U.S. 654, 693 (1988). Under the Ethics in Government Act, the independent counsel was appointed by a special panel of federal judges upon application by the Attorney General. Congress could request an investigation pursuant to the Act; upon receiving such a request, the Attorney General was required to seek the appointment of an independent counsel unless there were "no reasonable grounds to believe that further investigation [was] warranted." Once appointed, the independent counsel could be removed by the Attorney General only in limited cases. *Id.* at 659-69.

identified in the previous section are so serious as surely to qualify as “undue interference” or “excessive intrusion,” even admitting the muddiness around the borders of those concepts. In the case at hand, however, we can do better than rely on those amorphous labels, for fast track implicates a more particular (and quite old) principle that lies behind much of the doctrine. The content of this principle will be developed in greater detail as we proceed, but it can be expressed in rough terms as the requirement that each branch be “master in [its] own house.”²²⁴ A bit more formally, the requirement is that no branch be beholden to another as respects its own internal affairs.

The operative notion of non-beholdenness has resonances in republican conceptions of freedom and independence familiar to the founding generation. Contrary to today’s prevailing view, on which we conceive of liberty in terms of the absence of constraint, the republican view was that a person was unfree when he lived in a state of susceptibility to mastery or domination.²²⁵ The paradigm case of unfreedom in this tradition was the life of a slave or servant, not because his master necessarily interfered with his actions, but because the servant was always vulnerable to his lord’s caprices, or else had to resort to flattery and fawning in order to win favor.²²⁶ A slave was therefore unfree even if a kindly master never prevented him from doing as he pleased.

²²⁴ *Humphrey’s Executor v. United States*, 295 U.S. 602, 630 (1935). A methodological note about the status of this “principle” may be in order here. What the Constitution has to say about the separation of powers (as well as other structural issues like federalism) cannot be distilled into a single short formula. Many types of violation are possible, and there is no single test to detect them all. The Constitution does, however, give rise to a number of heuristic structural principles, each of which helps us identify a particular structural concern. For example, the anti-commandeering principle of recent federalism cases, see *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992), alerts us to a particular sort of federal interference with state governmental processes. Likewise, some separation of powers cases reflect the importance of a conflict of interest principle. See Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989). The principle at issue in this paper has the same ontological status.

²²⁵ On the republican view of liberty as non-domination, see generally PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997); and QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998). The republicanism at issue here—whose intellectual history stretches from Cicero through Machiavelli to the English Civil War and the American Revolution—should be distinguished from the participatory “civic republicanism” that currently attracts a great deal of attention.

²²⁶ See PETTIT, *supra* note 225, at 31-35 (describing the prominence of the freedom-versus-slavery theme).

For the Founders, it was obvious that a government of separated powers abhorred a servile dependence of one department of government upon another. “If it be essential to the preservation of liberty that the Legis[ative], Execut[ive] & Judiciary powers be separate,” Madison said at the Convention, “it is essential to a maintenance of the separation, that they should be *independent of each other.*”²²⁷ Madison’s statement might at first look like a mere tautology, but it is not. “Independent of,” as used in this context, is not just a synonym for “separated”; it means instead “not *dependent upon,*” as becomes clear as Madison continues:

The Executive could not be independent of the Legislure [sic], if dependent on the pleasure of that branch for a re-appointment. Why was it determined that the Judges should not hold their places by such a tenure? Because they might be tempted to cultivate the Legislature, by an undue complaisance, and thus render the Legislature the virtual expositor, as well the maker of the laws. In like manner a dependence of the Executive on the Legislature, would render it the Executor as well as the maker of laws; & then according to the observation of Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner.²²⁸

A president whose re-election was in the legislature’s hands would be, in a palpably plain sense, beholden to that body. And this servile dependence, Madison thought, was the path to the tyranny of consolidated authority that the separation of powers hoped to avoid. (And this is true even though a dependent president would still be executing the law, a dominant legislature still legislating, and so on.) As Professor Nourse’s work on these matters has shown, the discourse of inter-branch beholdenness was the Framers’ chief idiom for conceptualizing the separation of powers.²²⁹

²²⁷ 2 RECORDS, *supra* note 136, at 34 (July 17, 1787) (emphasis added).

²²⁸ *Id.*

²²⁹ See Nourse, *supra* note 20, at 459-63.

These same issues motivate the Supreme Court's analysis in old cases like *Myers v. United States*,²³⁰ one of the most important cases for understanding this face of the separation of powers. The immediate question at issue in that case was whether a postmaster, an executive officer appointed by the president with the advice and consent of the Senate, could be removed by the president acting alone, notwithstanding a statute that purported to condition removal, like appointment, on the Senate's consent. Chief Justice (formerly President) Taft's majority opinion covers a broad swath of constitutional history and doctrine in the course of consuming some seventy pages in the *U.S. Reports*. He finds persuasive the claim that removal is in the nature of "executive power,"²³¹ as well as the view that the power of removal necessarily follows from the president's power to appoint (not from the Senate's inferior power of consenting to appointments),²³² and above all Taft approves the notion that the power to remove is implicit in the president's duty to "take care that the law be faithfully executed."²³³ The real psychological lynchpin, though, is the idea of dependence. The Chief Justice quotes Madison's comments from the 1789 congressional debate over removal of certain cabinet officers:

If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.²³⁴

Officials are dependent upon those who can remove them. If the men and women *within the president's own administration* are dependent for their livelihood on the legislators, not on the president, then the executive ceases to be an independent, and thus

²³⁰ 272 U.S. 52 (1926).

²³¹ *Id.* at 115-18.

²³² *Id.* at 122, 126-27.

²³³ *Id.* at 117-18, 122, 131-33.

²³⁴ *Id.* at 131 (quoting 1 ANNALS OF CONG. 518 (Joseph Gales ed., 1789)).

separate, department of government.²³⁵ Elsewhere in the quoted passage, Madison expresses the point in a way that seems overly alarmist today—warning of executive officers “join[ing] in cabal with the Senate”²³⁶—but the threat, as valid as a psychological matter today as then, is simply that the president’s subordinates will end up doing the bidding of the Senate. Experience under the state constitutions had in fact shown the dangers of legislative dominance of the executive,²³⁷ and such combinations of power were exactly what the new Constitution was meant to avoid.

Now, we should be careful to recognize the limits of this evident rule of non-dependence as it applies to the presidency. It is axiomatic that *executive* officers, including even the president, execute the directives of a superior policymaker. The president’s legitimate authority over his administration does not, in the usual case, extend to countermanding legislative commands. Nor does the Constitution vest the president with sole control over executive appointments.²³⁸ Moreover, the president is ultimately dependent upon the legislature in that he may be impeached. Executive independence should be understood as a background principle that applies in the absence of specific textual efforts to restrain the president.²³⁹

No similar textual derogations from the presumption of independence can be found with respect to the legislature. On the contrary, in the Constitution one finds repeated affirmations of the legislature’s sovereignty over its own internal affairs. For example,

²³⁵ The executive’s need for autonomy over its internal affairs requires not only that the president have control over his people but also that he have “independent authority to control his own time and energy,” *Clinton v. Jones*, 520 U.S. 681, 711 (Breyer, J., concurring), a principle that can in some cases let him avoid or delay judicial proceedings.

²³⁶ 1 ANNALS OF CONGRESS 480.

²³⁷ See, e.g., THE FEDERALIST NO. 48, *supra* note 144, at 277 (“The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.”); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 407 (“The governors were mere ciphers, almost totally dependent on the legislatures, with little or no power to resist or control the political and social instability.”).

²³⁸ Presidents have sometimes insisted that the separation of powers entitles them to a circle of close advisors whose selection cannot be conditioned upon Senatorial consent. See Douglas S. Onley, Note, *Treading on Sacred Ground: Congress’s Power to Subject White House Advisors to Senate Confirmation*, 37 WM. & MARY L. REV. 1183 (1996).

²³⁹ Madison took this view. See 1 ANNALS OF CONGRESS 516-17.

the Arrest Clause and Speech or Debate Clause,²⁴⁰ which respond largely to the Stuart monarchs' use of seditious libel prosecutions against opposition MPs, provide our legislators with protection from "intimidation by the executive and accountability before a possibly hostile judiciary."²⁴¹ "Otherwise," Thomas Jefferson explained in his parliamentary *Manual*, "it would be in the power of other branches of the government . . . to take any man from his service in the House, and so, as many, one after another, as would *make the House what he pleaseth*."²⁴² Members are accountable to their colleagues and to their constituents for what they say in debate, but the other branches cannot be the master of what happens within the chamber.

Even more fundamentally, the constitutional design safeguards the legislature's internal sovereignty by protecting its members' institutional allegiances. The Constitution's Incompatibility Clause²⁴³ forbids members of Congress from holding positions in the executive branch. The rule responded to the practice on the part of seventeenth- and eighteenth-century British monarchs, as well as of royal governors in the Colonies, of holding out highly remunerative offices, pensions, and titles to members of the legislature.²⁴⁴ Yoked with these corrupting incentives, the so-called "placemen" could reliably be counted upon to rubberstamp the king's proposals. The incompatibility rule sought to prevent legislators from becoming dependent on the executive in this way, much the same as *Myers* does for the reverse situation.

The constitutional importance of the legislature enjoying a protected sphere of control over its internal affairs trumps functional

²⁴⁰ U.S. CONST. art. I, § 6, cl. 1 ("[Senators and Representatives] shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other place."). The Articles of Confederation included a similar guarantee. *See* ARTS. OF CONFED. Art. V, cl. 5.

²⁴¹ *United States v. Johnson*, 383 U.S. 169, 181-82 (1966). The *Johnson* court quotes Madison's remarks in *The Federalist* and states that "[t]he legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature." *Id.* at 179.

²⁴² HOUSE MANUAL, *supra* note 9, § 305 (emphasis added).

²⁴³ U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

²⁴⁴ *See generally* Calabresi & Larsen, *supra* note 20, at 1053-62 (describing the historical background of the Incompatibility Clause).

mismatches that might otherwise raise separation of powers issues. As the Supreme Court has recognized, Congress performs a number of “executive” activities that relate to its own management: “the Capitol Police can arrest and press charges against lawbreakers, the Sergeant at Arms manages the congressional payroll, the Capitol Architect maintains the buildings and grounds, and its Librarian has custody of a vast number of books and records.”²⁴⁵ The Constitution also directs the legislature to perform apparently “adjudicative” functions—such as being “the Judge of the Elections, Returns, and Qualifications of its own Members”²⁴⁶—when the activities implicate matters that go to the heart of the department’s institutional existence. Commenting on that clause, Justice Story pointed out the practical wisdom of such a provision: “If [the powers were] lodged in any other [body] than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed, or put into imminent danger. No other body, but itself, can have the same motives to preserve and perpetuate these attributes.”²⁴⁷ These provisions therefore do not derogate from the separation of powers; they bolster it.

The Rules of Proceedings Clause, we are now in a position to see, is continuous with, and informed by, these other parts of the constitutional design. This is not to suggest that high theory directly prompted the adoption of the clause; for, on the contrary, it attracted almost no debate.²⁴⁸ Nonetheless, the Clause embodies the principle that, in a quite literal way, each chamber is to be “master in [its] own house.” Just as the Incompatibility Clause hopes to ensure that legislators are psychologically governed by their own institutional and electoral incentives, not the executive’s financial

²⁴⁵ *Bowsher v. Synar*, 478 U.S. 714, 753 (1986) (Stevens, J., joined by Marshall, J., concurring in the judgment). Similar comments could be made with respect to the judiciary’s relationship to marshals. See generally *Penn. Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 43 (Stevens, J., dissenting) (recounting the history of the relationship between the courts and the marshals).

²⁴⁶ U.S. CONST. art I, § 5, cl. 1.

²⁴⁷ STORY, *supra* note 155, § 831. Adrian Vermeule argues that Story’s view is fallacious as a matter of constitutional design because it overlooks both the costs of legislative autonomy (such as self-dealing and majority opportunism) and the possible benefits of disinterested review. Vermeule, *supra* note 108, at 25. In my view, the better interpretation is that Story and the Framers believed that legislative autonomy over such matters was so important as to justify the risks, not that they were inattentive to them.

²⁴⁸ *Supra* notes 152-156 and accompanying text.

inducements, the rules power ensures that legislators are self-governing as a practical matter. Both are aimed at the same problem: namely, ensuring that the legislature is a vital and independent voice, not merely a rubber stamp for the executive's proposals. Fast track, of course, moves toward the latter situation by limiting debate and forbidding amendment.

When issues such as a chamber's rules of debate, internal discipline, and members' election contests are made matters of statutory law, the president (and the other chamber) gains a voice over them. Even if both chambers wish to change their *own* rules of debate, under a regime of statutized rules they can do so only with the president's approval, unless they can manage a supermajority in both houses. If only one house wishes to change the law, it is completely helpless to do so. Constitutionally speaking, these are areas where the president, and even the other chamber of Congress, has no business playing the role of master. And it is no response to say that both houses consented to this arrangement when the original statute was passed, for that is true of the Line Item Veto Act and every other statute that would impair the legislature's constitutional stature.²⁴⁹ Unilateral control over rules of proceedings is (along with other features of legislative self-governance) constitutive of the body's independence, and so, in the Framers' view, of its institutional separateness.

C. Implications

So where does all of this leave us? The task was to find the proper context in which to understand the grant of power in the Rules of Proceedings Clause. Standing alone, the clause was ambiguous with respect to the question whether the statutory form was available to set parliamentary rules. The separation of powers considerations adduced above resolve that ambiguity by elucidating the constitutionally relevant consequences of setting rules with statutes. Statutory rules like fast track shift policymaking power to the president in a way that reverses the normal rules of the legislative game, essentially making the president into a policy monopolist. Moreover, the president attains this power in a way particularly

²⁴⁹ See *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) ("That a congressional cession of power is voluntary does not make it innocuous. . . . Abdication of responsibility is not part of the constitutional design.").

offensive to the Constitution—namely, by wielding a share of control over the legislature’s internal affairs. The Rules of Proceedings Clause should therefore be read as describing the exclusive means of determining rules of debate.

The analysis offered here does not mean that a statutized rule is void *ab initio*. The statute setting the rules was passed by majorities of both houses, and that is all that is required to set a rule.²⁵⁰ Therefore, when a measure subject to special statutized rules comes up for a vote, the statutized rule should initially apply so long as the statute remains in force.²⁵¹ The statutized rule applies only as a default, however, since each house must retain exclusive control over its own rules. If one house chooses to change the rules, its action does not violate *Chadha* since the original statute could not purport, as a matter of constitutional law, to require the chamber to follow rules with which it disagreed. In sum, a statutized rule of debate is valid but avoidable.

CONCLUSION

Ranging over fields from the budget process to trade agreements, laws governing the lawmaking process are an important and growing phenomenon. This Article has attempted to provide an account of their constitutional status. As described in Part II, the conventional view is that statutized rules implicate the anti-entrenchment norm,

²⁵⁰ Senate Rules V and XXII require a supermajority to *end debate* on a motion to change the rules, but a majority suffices to pass the underlying proposal. On the Senate’s rules process, see generally *supra* notes 128-134 and accompanying text.

²⁵¹ That the statutized rule remains in effect past the session when it was adopted does not pose constitutional difficulties. In the Senate, all rules continue in force indefinitely until amended. *Supra* notes 128-129 and accompanying text. In the House, it is true that it has become the practice to adopt new rules at the beginning of each session. But this does not mean that the Constitution forbids rules from carrying over. On the contrary, the House’s practice for the first hundred years of the Republic was that rules *could* carry over; the old rules remained in effect unless and until the new session changed them. See 5 HINDS’ PRECEDENTS, *supra* note 83, §§ 6743-47 (recounting the history on this point). The prohibition is only on one session trying to continue over its rules against the will of a successor. There is therefore no bar on statutized rules persisting from one session to the next, subject to being abrogated at any time. In any case, little of practical import turns on this point, as the rules adopted at the beginning of a session typically include a provision re-adopting existing statutized rules. See, e.g., HOUSE MANUAL, *supra* note 9, § 388; H.R. Res. 5, 108th Cong. (2003) (enacted) (adopting “applicable provisions of law or concurrent resolution[s] that constituted rules of the House at the end of the One Hundred Seventh Congress”). The current version of House Rule XXVIII provides, in part, that “[t]he provisions of law that constituted the Rules of the House at the end of the previous Congress shall govern the House in all cases to which they are applicable.”

which forbids one Congress from binding its successors. I noted that this view was strange, since statutes like fast track in no way try to prevent their own repeal by later legislation. The problem with fast track is *not* that it represents a cross-temporal power-grab in which a current Congress aggrandizes itself at the expense of a later one, but that it effects a horizontal shift in power between the Congress and president. Or, more precisely, to the extent there is any issue of cross-temporal impairment, later legislatures are only impaired because of that horizontal shift.

The entrenchment view also confronted the puzzle that, if binding one's successors was the problem, statutized rules probably do not cause that prohibited effect to any worse degree than would the normal rules process. This was because the Senate's burdensome internal procedures for changing the rules quite possibly make it easier to change the Senate's rules through ordinary legislation.²⁵² And if that were so, it would be difficult to complain about statutized rules on the ground that they entrenched themselves.

If entrenchment is not the problem with statutized rules, then the relative difficulty of changing the rules is beside the point. What matters is *who* gets to decide. Under the Constitution, the choice belongs to each house alone, and the other players are to have no role. That the Senate's rules are extremely hard to change may be a problem, perhaps even a constitutional one, but it is not the same type of problem as besets fast track.

The separation of powers approach developed in Part III joins in the entrenchment critique's general conclusions about statutized rules, but it aims to reach those conclusions in a more theoretically satisfying way. In at least one important case, however, the two approaches yield different practical results. Recall that Congress does apparently feel bound in matters of procedure by statutes passed earlier in the same session.²⁵³ This result is consistent with the entrenchment approach, but it is problematic on the separation of powers view. Through the lens of the latter, the trouble is that the chamber operating under the statutized rule lacks exclusive, unilateral control over its procedures; to change them, it must get the consent of the other house and the president (or, if both houses are willing but the president is not, large supermajorities in both

²⁵² *Supra* notes 139-141 and accompanying text.

²⁵³ *See supra* note 89 and accompanying text.

chambers are needed). We need not answer the question whether a chamber may, by acting through the unilateral rules process, constrain itself to follow a certain rule throughout a session. Whatever the answer to that question, legislators may not achieve that aim through ceding power to a coordinate branch.

Viewing the Rules of Proceedings Clause as an expression of a principle of internal autonomy adds context to the clause's inconclusive text. It was easy to conclude that the clause grants a permission to set rules unilaterally, but it was unclear whether the clause should be taken as the exclusive method of setting the rules, acting as a limit on the legislature's broad power to pass any statutes useful in attaining permissible aims. Moreover, in light of *Chadha*, it was puzzling how Congress could purport to "amend" a statutized rule through unilateral action. By considering the separation of powers aspect of the rules power, we can now see why the power to set the rules is always reposed in each house. A decision to deviate from the statutized rule does not "amend" the statute, for the statute could not, as a matter of constitutional law, purport to commit the legislature to follow rules not of its choosing in the first place. This is of course not to say that, when a bill subject to the special procedures comes up for debate, the house cannot accede to using those procedures. But it may always choose not to follow them, exercising its constitutionally mandated power to choose. This may well be a cause for sadness, for the ability to commit oneself to follow a set of rules has undeniable utility. Statutized rules can be either binding or constitutional, but not both.